

STATE WATER RESOURCES CONTROL BOARD

PUBLIC HEARING ON AMENDED JOINT PETITION OF THE
IMPERIAL IRRIGATION DISTRICT AND THE SAN DIEGO COUNTY WATER
AUTHORITY FOR APPROVAL OF A LONG-TERM TRANSFER OF CONSERVED
WATER PURSUANT TO AN AGREEMENT BETWEEN IID AND SDCWA, AND
APPROVAL OF CHANGES IN POINT OF DIVERSION, PLACE OF USE AND
PURPOSE OF USE UNDER PERMIT NO. 7643 (APPLICATION 7482).

TUESDAY, JULY 16, 2002
10:00 A.M.

CAL EPA BUILDING
SIERRA HEARING ROOM
SACRAMENTO, CALIFORNIA

REPORTED BY:

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SACRAMENTO, CALIFORNIA

TUESDAY, JULY 16, 2002, 9:00 A.M.

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CHAIRMAN BAGGETT: Welcome back to the last day of what is probably one of the most complex quick hearings we've ever done. Almost feels like a stay hearing in retrospect.

Today we will conclude with the closing arguments. I certainly appreciate the efforts that you all went to. As you can see, these do not go unread, at least by me or my staff. I think we all probably had the same kind of weekend. Maybe not.

Maybe we should have a week between when we have these arguments. Next time. With that, I think we set up the rules, ten minutes.

Is there any consolidation of parties?

MR. RODEGERDTS: We are not consolidated. All three are going to speak.

CHAIRMAN BAGGETT: Defenders.

MR. FLETCHER: PCL is going to join in the statement I am making. I'm not planning on taking 20 minutes. I am not sure it makes a difference.

CHAIRMAN BAGGETT: Then IID, the two petitioners each, we granted 20 minutes each.

MR. OSIAS: If San Diego runs short, we'll--

1 MR. SLATER: We are coordinated.

2 CHAIRMAN BAGGETT: With that we have a couple
3 procedural motions that were large. IID requested official
4 notice of a Bureau of Reclamation notice regarding
5 implementation of interim surplus guidelines.

6 Is there any objection to that being put in the record?

7 MR. SLATER: No objection.

8 CHAIRMAN BAGGETT: If not, then that will be added.
9 Imperial County filed a motion to admit evidence on related
10 certification of the EIR.

11 Did everybody receive a copy of that?

12 MR. RODEGERDTS: What EIR?

13 CHAIRMAN BAGGETT: Mr. Rossmann.

14 MR. ROSSMANN: I will just show Mr. Rodegerdts. The
15 official documents relating to the IID certification.

16 CHAIRMAN BAGGETT: If there is no objection, then we
17 will put those in the record.

18 There were some extra record evidence in a couple
19 briefs, and I think I would rather deal with that up front.
20 I think, as you know, we can take official acts under
21 Evidence Code 452 and also under our own rules of certain
22 documents. We notice in a couple closing briefs, Defenders
23 and Imperial County had a number of documents cited which
24 weren't in evidence, at least to our recollection. I don't
25 know if the parties want to address those or I can list the

1 documents, or are there any objection?

2 Maybe we should start out, if there is objection, then
3 we will admit all the cites into evidence from the
4 Defenders' brief and from the County's brief. There was
5 reference to Congressional record to submit the draft
6 conservation plan and a number of things. I would just like
7 to make clear that they are in the record or not. Right now
8 you aren't.

9 MR. SLATER: Our position is that as to those things
10 that are within the normal purview of judicial notice we
11 have no objection. As to those things which require laying
12 a foundation and some testimony as to what the document is
13 and means, we do. Without going through the individual
14 list, I think that is the basis of our nonobjection as to
15 certain pieces.

16 MR. OSIAS: I actually do think that the listing of
17 them, maybe that could be done at a break or something so
18 that we can just bring forward the list or hand out a list.

19 MR. SLATER: I think that would be useful because I am
20 not sure that we picked up all the references that Mr. Chair
21 is identifying.

22 CHAIRMAN BAGGETT: Maybe that would be the most
23 expeditious, to pull those two listed. What we will do is
24 we have a list of five cites from Defenders and six from the
25 County's brief that were not in the record and I would just

1 like to -- so we don't deal with motions after today
2 objecting and we have to go back and erase and check. Let's
3 just get it all out today.

4 What we will do is we will print off at the break and
5 supply a copy and then we can deal with those. With that --

6 MR. OSIAS: Mr. Chairman, one other housekeeping. When
7 we admitted into evidence the final EIR, the last day of the
8 evidentiary session, we forgot to give it a number. So we
9 assigned it the next number in order. So everybody knows,
10 it is No. 93, and the two incorporated documents, one was
11 the QSA PEIR was 93A and the federal EIS or Inadvertent
12 Overrun Program was 93B. We submitted an amended exhibit
13 list to that effect and served it on folks.

14 CHAIRMAN BAGGETT: Very good. Likewise, we will assign
15 these numbers when we come back from a break.

16 With that, I think we are ready for the -- first up was
17 the agricultural groups for lack of a -- or the farmers.

18 MR. GILBERT: That sounds good, either one.

19 CHAIRMAN BAGGETT: Mr. Gilbert.

20 MR. GILBERT: Thank you, Mr. Chairman.

21 Since the 1980s IID and its farmers have been called on
22 to become more efficient. Not because we were the least
23 efficient district in the state, far from it. But since our
24 return flows are lost for further domestic or agricultural
25 use, we could create new water for the state for these

1 purposes by improving our efficiency.

2 The set of agreements we are considering in response to
3 the call for IID to improve its efficiency and to similar
4 calls by the U.S. Bureau of Reclamation and the Coachella
5 Valley Water District. In an interesting turns of events,
6 recently there have been calls for maintenance of inflows to
7 the Salton Sea in an effort to protect birds that use the
8 lake. It would seem that before such a departure would be
9 seriously considered, convincing evidence defining which
10 species would be impacted would certainly need to be
11 presented. Unsubstantiated claims and inferences would not
12 be enough. But no such evidence was forthcoming in this
13 hearing. And since no compelling evidence has been
14 presented, we are left to conclude that few, if any, species
15 would be seriously impacted by hastening the Salton Sea's
16 relentless progression to a hypersaline state.

17 When weighed against the loss of farmland habitat that
18 would result from implementation of the following program,
19 it would be logical to conclude that from an environmental
20 perspective a following program, the disadvantages of a
21 following program actually outweigh the advances. This is
22 especially true when one considers the hundreds of species,
23 including the endangered burrowing owl that rely on farm
24 fields to provide their food supply and habitat. Shrinking
25 this habitat by following tens of thousands of acres would

1 obviously impact these species.

2 Salton Sea HCP Approach 2, the proposal that maintains
3 inflows to the Salton Sea, if done by fallowing would cause
4 more harm to resident species in the area than if the water
5 were conserved by improving IID's efficiency. It should be
6 rejected.

7 If the transfer is to be approved, it should generate
8 new water by efficiency improvements so California's water
9 supply and for domestic and agricultural uses will be
10 increased.

11 On a slightly different subject, care must be taken to
12 ensure that IID, including its landowners and residents and
13 farmers, are protected from claims for damages, damages to
14 people, property or the environment, that result from the
15 good faith fulfillment of its contract obligations to
16 conserve water and transfer that water pursuant to the
17 agreement with the Authority, the QSA and related
18 documents.

19 The benefits of this potential transfer are far
20 reaching and mostly accrue to those outside the IID area.
21 It would not be right for the few farmers in IID to bear the
22 risks of future liabilities that might arise from this
23 transfer. Also individual landowners rights to receive
24 water and the opportunity to conserve for transfer should
25 not be diminished because of the adherence to policies and

1 regulations of IID and provisions of the Water Code
2 requiring efficient water use. To do so would set a
3 terrible precedent and must not be allowed to happen.

4 Any distribution of the right to receive water and
5 opportunity to conserve must be done on a fair and
6 equitable basis and one that adheres to the principles of
7 the Water Code.

8 Also, landowners within IID who depend on their right
9 to receive water must not be injured by having the price IID
10 receives for transferred water decrease to a level below the
11 cost of conserving the water the method specified in the
12 agreement. All analyses and discretions of the financial
13 adequacy of the transfer price were based on the base
14 contract price. The price redetermination feature of the
15 contract introduces an unacceptable level of risk to water
16 users in IID and must be rejected.

17 In summary the original idea for this transfer was
18 good. It could provide major benefits to many Californians.
19 Unfortunately, as the project developed, so did the flaws.
20 As it now stands, the flaws far outweigh the benefits. I
21 urge you to deny that petition as the transfer currently
22 stands.

23 And, Mr. Chairman, it is no secret that Mr. Du Bois,
24 Mr. Rodegerdts and I have been working together during this
25 hearing. And while we focused on different issues from time

1 to time, I have been in complete agreement with them on all
2 the issues that we have pursued, and I can concur with Mr.
3 Du Bois' statements in his briefs, and it is my pleasure to
4 make the balance of my time available to Mr. Du Bois or Mr.
5 Rodegerdts.

6 And just in closing I would say it's been an honor to
7 be able to participate in this hearing.

8 Thank you.

9 CHAIRMAN BAGGETT: I have one question from reading
10 your brief. You make a point about the financial burden, it
11 being placed on farm operators. I guess one question would
12 be, in your opinion, and maybe Mr. Du Bois or Rodegerdts may
13 have a comment on this also, is it the place of this Board
14 to be involved in a contract? The contract between San
15 Diego and IID sets compensation for conserved water and
16 whatever. I guess, are you proposing this Board should
17 interject terms into that contract or be involved in a
18 contract between two public agencies to increase the amount
19 of -- it seems to me it is about you feel like you are not
20 getting enough. There is not enough money to pay for this
21 conservation or whatever they are asking.

22 MR. GILBERT: There is -- if you're referring to the
23 price redetermination feature?

24 CHAIRMAN BAGGETT: Right.

25 MR. GILBERT: Our fear is -- my fear and some of the

1 people that I have spoken with in the ag community have
2 great fear that if this is invoked it could reduce the
3 price of the transferred water dramatically and that could
4 put us in a real bind as far as our ability to do the
5 conservation work that is specified in the contract.

6 As to what the Board's place would be in that, I'm
7 afraid that I am not really qualified to make that
8 statement.

9 CHAIRMAN BAGGETT: Related to the whole following
10 discussion. Which I am sure we will have a lot of today, it
11 is a voluntary program. It would be up to you as an
12 individual farmer to enter into an agreement with the
13 District as the evidence and we understand. So nothing
14 would happen unless -- it seems the farmers even though they
15 aren't, quote, legal users of water, you have the trump
16 card. Because if nobody signs up as a voluntary conservor
17 or fallower or rotational, whatever method is used, nothing
18 will happen.

19 Am I not -- so it seems in the end you will make the
20 final, as individual farmers, will make the determination
21 irregardless of what we do here or even what San Diego and
22 IID do with their agreement. Am I missing?

23 MR. GILBERT: That is partially true in my
24 perspective. There might be three groups that can be
25 considered together but separate. Those who are landowners

1 that are not farmers, and many of them reside outside of the
2 valley. Those who are landowners and farm their own land,
3 and then those who farm the land but do not own it. And I
4 think there would be much greater interest for the
5 landowners, especially those absentees, to sign up for any
6 program that would pay more than the rent that they are
7 currently receiving for their land.

8 So it is very possible that a few people might be
9 anxious to sign up. And, of course, this understands that
10 we do not yet know exactly what form the proposal would
11 take.

12 As far as those of us who are farmers and landowners,
13 and those who are farmers predominantly and not landowners,
14 it would take a different perspective. And so while we pay
15 the water bills, we might be in a different position.

16 CHAIRMAN BAGGETT: Thank you.

17 Mr. Du Bois or Mr. Rodegerdts, do either of you have
18 any?

19 MR. DU BOIS: Mr. Baggett and Members of the Board and
20 staff, as the EIR dictates, the practical effect of the
21 transfer now is to violate an agreement against fallowing.
22 To sum it up, Imperial now in effect fallows land to sell
23 water to San Diego. The agreement was to refrain from
24 fallowing, but the EIR almost guarantees it. And I don't
25 expect the IID, therefore, to go ahead on that basis.

1 IID now pays a terrible price. Its farmers must deal
2 with the \$23,000,000 debt incurred to pay for the EIR. It
3 did not have this debt when it entered the transfer
4 proposal. With this experience and with this debt IID must
5 now find a customer which is willing to invest up front,
6 take on the liability, if any, of Salton Sea and wait a few
7 years to have its water delivered. It seems to me
8 environmental justice does not allow the State Water Board
9 to subject IID to the present anticipated cost and
10 liability.

11 IID claims in its brief the State Water Board should
12 approve its application. IID would further improve its
13 efficiency as requested by the Board in D-1600 and
14 subsequent orders. But since much fallowing is required, it
15 won't improve the efficiency of IID and its farmers by that
16 much. The larger part of California would benefit from the
17 next 15 years of increased deliveries of Colorado River
18 water. But as a landowner, I request self-restraint on the
19 part of the State Water Board until the future of Salton Sea
20 is more clear as to who benefits and who pays.

21 My belief is that under these circumstances the IID is
22 compelled to and will cancel the agreement. In that case
23 the State Water Board decision will not result in a
24 transfer. I hope the Board will recognize that a practical
25 and right agreement has not been placed before the Board

1 and will postpone a decision until IID and San Diego have
2 agreed to a new proposal.

3 Alternatively, and this is not high on my list, I hope
4 the Board would approve a much scaled down transfer of
5 volume and time to about a hundred thousand acre-feet a year
6 for a period not exceeding 30 years to be generated by
7 delivery system improvement infrastructure to 30 years I
8 mention because that is the length of the exchange
9 agreement. Salton Sea will continue to receive about the
10 same flow of drain water for several years under these
11 circumstances. During which time nature will further
12 indicate what is to happen to the fish and the birds. IID's
13 efficiency will continue to improve.

14 During the next few years a new agreement can be worked
15 out between San Diego and IID which can be placed before the
16 State Board. Before any transfer takes place the following
17 issues must be much better understood, and there are ten,
18 and I enumerate them:

19 One, the Salton Sea liability.

20 Two, the operation of tile lines subsurface drainage.

21 Three, the equity of payments to farmers. It would not
22 include allotment based on history.

23 The fourth, the adequacy of payments to IID from
24 Coachella Valley Water District.

25 Five, the adequacy of payment to IID on Exhibit E.

1 Six, shorten the terms to 30 years to match the
2 exchange life.

3 Seven, reduce the risk of the early termination of
4 contract.

5 Eight, provide up-front capital.

6 Nine, minimize fallowing.

7 And ten, don't confuse fallowing by calling it land
8 management.

9 In closing, I would like to express my appreciation to
10 the Chairman for allowing me to present my family's concerns
11 in this process in spite of my lack of knowledge and
12 procedural requirement.

13 I would like to supplement Larry's answer to your
14 question about can a farmer kill this by simply not signing
15 up. What our danger is is that one landowner, nonresident
16 and non United States, owns 10 percent of Imperial Valley,
17 and could almost unilaterally ensure that this transfer
18 would go forward even if it is on a fallowing basis, by
19 fallowing their own land.

20 CHAIRMAN BAGGETT: I gather your concern is that land
21 is not rented out?

22 MR. DU BOIS: That's correct. Much of that land is in
23 quest of a farmer and in some distress. And so this puts
24 them at a real hazardous position.

25 CHAIRMAN BAGGETT: What about a program -- there has

1 been a lot of discussion of quote, phantom farming, temporal
2 and long-term fallowing, on-farm conservation. From your, I
3 guess, many, many years of experience down there, in
4 Imperial Valley do they ever do rotational crops where they
5 put a cover crop on for two or three years to basically help
6 rebuild the soils, to maintain the character of the soils so
7 it doesn't erode? I assume that fallowing where you turn it
8 to raw dirt, but is the use of a cover crop and rotation --

9 MR. DU BOIS: Thank you. I can answer that question I
10 think quite reliably. Until after World War II, it was
11 customary to grow cover crops in order to help the soil and
12 make the following crop more productive. After World War II
13 cheap nitrogen, particularly, was available. And it was
14 much more economic to give it a shot of and forget the soil
15 building cover crop. And so practically no cover crops have
16 been grown since that time.

17 CHAIRMAN BAGGETT: So, a cover crop scenario could
18 allow for water savings? If you did a cover crop every
19 three years to prevent or use less water than a traditional
20 crop?

21 MR. DU BOIS: I think we didn't customarily grow a
22 cover crop every two years, or there was no particular
23 pattern like that. But I do not know of an instance where
24 anybody planted a crop not for the purpose of selling the
25 product since the World War II.

1 CHAIRMAN BAGGETT: Since World War II. Okay.

2 Thank you.

3 MR. DU BOIS: Thank you very much.

4 CHAIRMAN BAGGETT: Thank you, Mr. Du Bois.

5 Mr. Rodegerdts.

6 MR. RODEGERDTS: Mr. Chairman, Members of the Board,
7 members of Board staff. The Imperial Irrigation District is
8 essentially marching to the plate for this water transfer
9 with a conservation concept. Agricultural community is part
10 of that concept and they're here too, although it is argued
11 that they have no standing to be here. So too is the
12 conservation community focusing on impacts to the Salton
13 Sea, and it's also argued that they shouldn't be here either
14 because they are not a user of the water.

15 Nonetheless, all these non users have been here. We
16 have participated in the dialogue and the debate, and much
17 time has been spent on addressing the impact of whatever is
18 done on the Salton Sea on Imperial Valley economy, on
19 agricultural production patterns, whether the water should
20 be transferred in the first place.

21 I think it is important to keep in mind that Salton Sea
22 Restoration Act passed by Congress and brought up in some of
23 the briefs contemplated that there would be a transfer in
24 this area and it would go forward, and that the concerns
25 about the Salton Sea would be addressed later. This may not

1 be what the environmental community is looking for at this
2 point in time. But I would suggest that perhaps they should
3 step back and allow something to go forward. There are
4 enough problems in connection with implementing these
5 transfers without at this point in time concerning ourselves
6 with the Salton Sea issues, regardless of how meritorious
7 they may be.

8 In connection with the other impacts, suggestion and
9 the proposal on the table advanced by Imperial Irrigation
10 District to lessen the impact that there will be no
11 fallowing, and I am sure that the Board is aware that the
12 agricultural contingent here heartily ratifies that
13 concept. But, of course, an expression we have seen several
14 times in the briefs, the devil is in the details. Many have
15 suggested, in fact, Mr. Rossmann and I had a little exchange
16 before we commenced this morning, that if we were counting
17 votes, we'd prevail. This Board would not approve this
18 proposal at this time.

19 And why? Because we really don't have anything on the
20 table. There has been a whole lot of talk this is not a
21 hearing about Environmental Impact Report, its adequacy,
22 what it says, what it doesn't do, the concepts discussing
23 it, so forth and so on. Yet that is the model that we have
24 all used. That is what we have talked about. We haven't
25 really talked about anything else.

1 That Environmental Impact Report is inadequate. It is
2 inadequate because there is nothing on the ground for us to
3 wrestle with. Mr. Chairman, you brought that out I think
4 the second day of this hearing. You said we don't know how
5 much water is involved, we don't know where it is going, we
6 don't know who is going to give it, is there really going to
7 be a transfer? There are so many details missing why are we
8 here? And that has been brought up in a couple of briefs.

9 And you know we could poo-poo that, but after, what
10 have we had, 16, 17 days of hearing, I suspect in your mind
11 you have had a couple of those answers. Maybe, maybe not.
12 The quizzical suggestion on your face suggests to me, no,
13 you haven't. And you know why you haven't? Because there
14 is nothing for us to wrestle with. There is nothing in
15 there, no plan. We have no idea who's going to
16 participate.

17 CHAIRMAN BAGGETT: I guess I have a number of
18 questions, probably ask Mr. Rossmann also. It says the Farm
19 Bureau's position is that this Board should detail to an
20 irrigation district exactly how they should run their
21 district?

22 MR. RODEGERDTS: No, sir.

23 CHAIRMAN BAGGETT: Tell them exactly how much land
24 should be managed this way and that way?

25 MR. RODEGERDTS: No, sir. I think, however, you're

1 entitled to have a couple of proposals out there and some on
2 the ground indication of whether the actual implementation
3 of this conservation plan is, in fact, going to have
4 participants and it is going to go forward and this is how
5 it is going to be done. That is what the locals, as I
6 understand it and I can consult with my colleagues, are
7 concerned about. In Farm Bureau's comments on the EIR draft
8 Farm Bureau attempted to summarize what was lacking in that
9 EIR but not having something there that we could wrestle
10 with as we understood our constituency was suggesting to
11 us.

12 Number one, how is the conservation plan actually going
13 to operate on the ground?

14 Two, unless landowner payments have some relationship
15 to efficiencies achieved, there will be little improvements
16 in those efficiencies.

17 Three, the plan being proposed is the inappropriate
18 base period for determining water availability.

19 Four, no economic assurances are being proposed for
20 individual landowner conservation projects if the transfer
21 is terminated and a revenue stream for water conserved
22 ceases.

23 And five, there are no provisions for indemnification
24 if environmental damage claims are asserted by reason of the
25 conservation programs and subsequent water transfer by any

1 means could mean what is happening to the Salton Sea if it
2 is, in fact, deprived of the water supplies that it is
3 currently receiving because we are shipping that water off
4 to San Diego. You know that. We all know that. It doesn't
5 make the problems go away.

6 CHAIRMAN BAGGETT: You have answered my question.

7 Any other --

8 MR. RODEGERDTS: Just a few more minutes.

9 Now, not only is the Imperial Irrigation District
10 suggesting there should be no fallowing, and farming
11 community suggesting there should be no fallowing, we have
12 the county and they are not exactly sure what needs to be
13 done, but they are certainly on the team to suggest that it
14 is premature for this Board to approve anything that it has
15 seen to date.

16 I make it clear, we join, the farming community joins
17 the State of California and the people of California in the
18 belief that this transfer really must go forward. But you
19 have to do it in a way that it does not have adverse, what
20 Farm Bureau had said from the outset in these proceedings,
21 third-party impact. Nobody wants to talk about those
22 because, you know, it is not something that is supposed to
23 be part of your jurisdictional arena. It is not supposed to
24 be part of the environmental review arena. Yet if we were
25 to look at the record and the number of pages devoted to

1 these issues about which we are not supposed to talk and not
2 supposed to consider, we've got to take a look at the whole
3 process if, in fact, we can't talk about these things. And
4 I know that is not your purview. But the farming community
5 is going to continue to talk about these things until it is
6 recognized at the state level that we need to do something
7 about this.

8 This is not going to be the only water transfer we are
9 going to see. They are going to get bigger and they are
10 going to get worse. We hold up as an example in some of the
11 testimony you heard Palo Verde, how they are doing a better
12 job and, you know, in fact, they are. Because they had a
13 plan to wrestle with. But that plan is going to reduce
14 production in that valley by 29 percent, now arguably part
15 of a normal fallowing program. That is the argument.
16 Nobody talks about the loss in food production around here
17 in these debates. We don't go far enough in our third-party
18 impacts. We've got to feed this state, this nation and the
19 world.

20 In these areas you just you don't find them anywhere
21 else. You heard that. We cannot impact the delicate
22 balance in this area by moving water to the detriment of
23 agriculture. What you have on the plain right now is a
24 proposal to move water through conservation and not affect
25 agriculture production and, therefore, not have any

1 third-party impacts. In fact, arguably a benefit in the
2 area. Yet we don't have a plan to wrestle with right now to
3 see whether that will really work. We have nothing for you
4 to address. That is the shortcoming. You should not
5 approve this project in its current form.

6 Thank you.

7 CHAIRMAN BAGGETT: Thank you.

8 Mr. Rossmann.

9 MR. ROSSMANN: Yes, sir.

10 Good morning, your Honor, Members of the Board and
11 staff. I don't want to start off on the wrong foot. Unlike
12 my other colleagues I might at some point ask for a little
13 more time rather than a little less because I think we have
14 been asked to take the laboring oar on this rightness issue,
15 and I would like to obviously anticipate and answer your
16 Honor's questions.

17 We are very thankful that we are not dealing with
18 testimony today, but just the argument.

19 Well, Mr. Rodegerdts beat me to the punch. If we took
20 a vote here, a majority of the parties feel that we don't
21 have a case that is right for the Board's review. We
22 unfortunately have the two largest parties who take issue
23 with that. Let me just briefly respond to the authority
24 that they raised in their brief.

25 They cited Remy Thomas & Moose, the CEQA book in

1 support of their novel contention. As I recall, this Board
2 at one point also shared that contention, that a responsible
3 agency can act on a project before a lead agency. And so I
4 went to the book from my good friends, Mike Remy, et al., to
5 see what they say about the responsible agency, and this is
6 the first sentence under the heading Approval by Responsible
7 Agency.

8 When, after being approved by a lead agency,
9 a project requires subsequent approval by a
10 responsible agency. The latter agency has to
11 consider the EIR. (Reading.)

12 I shared copies of that with our colleagues this
13 morning. The point is that I think anyone knowledgeable in
14 CEQA would not concede of what has been proposed to your
15 Board. Everyone knows that the responsible agency can only
16 act on the project that is approved by the lead agency.
17 When the dialogue speaks of the responsible agency acting on
18 the proposed project, what that has to mean is that it is
19 acting on the project proposed to it by the lead agency.
20 The problem in this case is that the lead agency hasn't
21 proposed a project to us.

22 Now, I learned something from San Diego's brief that,
23 in fact, this Board has already done this once before.

24 CHAIRMAN BAGGETT: I would ask to distinguish the San
25 Luis petition.

1 MR. ROSSMANN: Before I distinguish it, I guess I have
2 to be honest and say, sir, that I think it is wrong. We
3 have argued for precedence in this case, but part of
4 precedence is a judicial body recognizing that maybe it made
5 a mistake, and it ought to just acknowledge that fact.
6 Justice Frankfurter would be my first witness here. He once
7 joined in an opinion that overruled one of his prior
8 opinions and his response was that wisdom comes so seldom,
9 we won't reject because it comes too late.

10 And that is really what we would ask the Board to look
11 at here. Let's look at that San Luis Obispo case because, I
12 think, the Board in practical terms understood the
13 implications of what it was doing. Now there, of course, it
14 seemed that there was a specific proposed project. San Luis
15 Obispo had been working, we are told from this opinion, for
16 20 years on this project to enlarge this dam that had been
17 interrupted by the war. And it looked pretty assured that
18 once this Board rendered what looked like an advisory
19 opinion that San Luis Obispo was then going to go forward.

20 In fact, the most interesting thing about Order 2000-13
21 is this provision in it that counsel did not cite to the
22 Board. The extension of time shall be deemed denied unless
23 San Luis Obispo provides to the Chief Division of Water
24 Rights documentation that it had issued a notice of
25 determination within 25 days of the adoption of this order.

1 Your staff was looking at you there, sir. They wanted to
2 make sure that before the 30-day statute under CEQA ran San
3 Luis Obispo would be able to stand up as the lead agency
4 having approved a project to be the real defendant in the
5 CEQA case.

6 So I think your staff recognized that there was a
7 conceptual problem with going first, and they were able to
8 work their way out of it, if you will, by sort of giving a
9 conditional opinion that would be good for 25 days. I think
10 that was bad CEQA process, but at least it worked in the
11 practicalities of that case.

12 Now, your Honors ask yourself if 25 days after you
13 render a decision in this case is this district going to
14 file a notice of determination. I cited to Frankfurter.
15 Let me cite to another great while we are at it, Judge
16 Cardoza. What he said of his colleague on the New York
17 Court of Appeals applies to this Board. We cannot ignore as
18 judges what we must know as men. And anyone who has read
19 the newspapers on the water wire for the last few months
20 knows what is going on here. It is a game of chicken. In
21 fact, just this weekend I was reading something, to
22 paraphrase, the name of the game is for this project to die
23 by anyone's hands but the Imperial Irrigation District.

24 That is not fair to this Board. It is not fair to the
25 participants before this Board. Let the irrigation district

1 decide. Frankly, they have a strong case, as Mr. Du Bois
2 just indicated, for saying no. If I were a director of the
3 Imperial Irrigation District now looking at law and the
4 facts, I would vote no project. That is unfortunate. I
5 agree with what everyone had said about the need for a
6 transfer. They should not be ashamed of that fact. But
7 they should make that decision and not try to pass it to
8 this Board.

9 Yet out of that lemon there is a lemonade. And that is
10 perhaps this Board cannot take action, but at the same time
11 render an advisory opinion despite all the arguments against
12 advisory opinions, this might be the time for one.

13 CHAIRMAN BAGGETT: I guess where I'm having a challenge
14 here is in an area which I know you are quite familiar with,
15 highway projects. Traditionally environmental documents
16 will basically be bookends on alternatives, the range. You
17 will go through the environmental process which will set
18 some performance and some parameters for the project design.
19 Project design is done, then, after the environmental work
20 is done. It is approved. Then they go to the details on
21 how high the retaining walls will be, what kind of cut and
22 fills, what kind of, based on parameters in the
23 environmental document.

24 MR. ROSSMANN: Yes, sir.

25 CHAIRMAN BAGGETT: I guess I am trying to understand

1 the difference. I am quite familiar -- I was on the Board
2 when we adopted the San Luis --

3 MR. ROSSMANN: That sounds okay.

4 CHAIRMAN BAGGETT: I am familiar with that. I am
5 trying to understand, like I proposed to Mr. Rodegerdts and
6 Gilbert, is our role to micro detail a project, what percent
7 is going to be this versus that type of conservation, as
8 long as it is consumptively save water, I think is what you
9 find in Natomas, which a couple of you cited here, which I
10 think was very clear and how we expect that to really save
11 water as opposed to paper water happens.

12 MR. ROSSMANN: I think you were leading up to -- I
13 appreciate that question, your Honor, because I think I had
14 anticipated that in light of your prior dialogue. I guess
15 in the highway context, let's use a highway for example,
16 let's assume it is a highway that goes through a historic
17 neighborhood. Let's say that it goes through a national
18 scenic area, requires a determination under Section 4F that
19 there is no feasible alternative.

20 The project that is being proposed and the
21 environmental workup that comes with it has to be
22 sufficiently specific to enable in that case the federal
23 Highway Administration to make the Section 4F finding.

24 The functional answer here, your Honor, is what the
25 Board needs is something specific enough to enable this

1 Board to make the findings required by the Water Code. And
2 this weekend, as you said, I learned a lot about what goes
3 on in San Luis Obispo. But it seems to me that the record
4 you had in that case was sufficient enough for you to render
5 the findings that you were required to address in that case
6 even though it would have still have been my advice had I
7 been sitting in Ms. Differding's place that you wait for the
8 lead agency to go first.

9 We don't have that. We do not have a situation where
10 the Board can intelligently render the finding that this
11 transfer of water will not produce an unreasonable impact
12 from our perspective, economic or environmental, in the
13 County of Imperial. The very findings that you are hearing
14 in the order set forth that the District itself desires,
15 you cannot make. And so that is why in our brief we focused
16 on the burden of proof issue. And so, yes, I think in a
17 narrow sense the Board, if it makes a decision, has to vote
18 yes or no. And we are saying the answer is no.

19 However, this is where the advisory opinion process may
20 help. Because you can still give guidance and help the
21 parties. And when I say the parties here now, the benefit
22 of this proceeding is that we have a room full of people
23 outside of just the proprietors who made this contract. We
24 can sit down together and perhaps try to flush out and come
25 up with a project that everyone can agree with that does not

1 impose unreasonable economic or environmental effects.

2 And so that is why I say, your Honor, I have been,
3 County has been, the supervisors take heed daily from the
4 newspaper, from some of the Imperial Irrigation District
5 trustees, why aren't you with us. We've taken a lot of heat
6 on this. But we believe very firmly in it, that this Board
7 should not be placed in that institutional position of
8 having to approve something that is not fixed. And, your
9 Honor, may I just remind all of us that when this deal was
10 worked out in private as the government code allows and
11 signed in 1998, a categorical exception under CEQA was
12 claimed, and the answer was don't worry about the
13 environmental issues, don't worry about the details. This
14 will not become final until we have a hearing in front of
15 State Water Board. And so, your Honor, this is the only
16 proceeding where we have the opportunity, if you will, to
17 suggest fine-tuning of this agreement to make it
18 environmentally and economically acceptable.

19 CHAIRMAN BAGGETT: If the Board considers the worst
20 case scenario is that not sufficient?

21 MR. ROSSMANN: If the Board considers the worst case
22 scenario, that doesn't, in my view, advance us very far as a
23 state because I think the Board has to reject the worst case
24 scenario. The problem is we don't know what is in the
25 middle that might work.

1 Your Honor, I would just like to respond to some of the
2 issues raised principally by San Diego as to what some of
3 the elements of that finding of unreasonable effect, whether
4 it is under Article X, Section 2. Let's start with Article
5 X, Section 2.

6 San Diego makes what to me is an astounding assertion
7 that economic interests do not enter the Article X, Section
8 2 equation. I suppose as one who has generally represented
9 the environmental interests and worked for 30 years to get
10 the environment counted under Article X, Section 2, I should
11 be grateful that everybody thinks that and basically has
12 forgotten economics. But what are the paradigm cases of
13 Article X, Section 2? What is the Herming House case itself
14 that gave rise to Article X, Section 2? It was an economic
15 issue, not an environmental issue. That the pattern there
16 was causing economic harm to Edison that they couldn't build
17 a dam because the downstream riparian essentially claimed no
18 duty of reasonable use.

19 And in the Gerlach case which we cited to the Board,
20 again, it was an economic issue that was part of the Article
21 X. In fact, framed the entire Article X, Section 2 debate.
22 The difference here is that we are saying that the economic
23 interest are those of all Californians and not just the two
24 contracting parties. And in that respect perhaps San Diego
25 is right. There hasn't been a lot of law in that area. But

1 just as the environmental community flushed out Article X,
2 Section 2, to put the environment on the scale even though
3 the parties asserting that did not have privity of contract,
4 perhaps we have arrived at the time where we put the
5 economic interests of those not in privity on the scale.

6 So in answer to San Diego's assertion that there hasn't
7 been much law in this subject, our answer is let's create
8 that law together. And again to go back to the Gerlach
9 decision, Justice Jackson's reminder that the water law of
10 this state has been created by necessity. So here we are at
11 the crucial transfer of the one that everyone is looking at,
12 how is it going to work for third parties. The economic
13 interests that Imperial County speaks for counts in the
14 Article X, Section 2 analysis.

15 Professor Thompson did not say, as San Diego argues in
16 their brief, that if the model Water Code were in effect,
17 this Board would have a duty to reject it if it found it
18 unreasonable. Professor Thompson said the law of California
19 today requires that determination.

20 And then if I could just kind of conclude this line of
21 argument, Water Code Section 1810 specifically applies to
22 this transfer and, if you will, refines the Article X,
23 Section 2 framework by requiring this Board to make an
24 expressed finding that the environment and economy of
25 Imperial County will not be unreasonably affected.

1 CHAIRMAN BAGGETT: If we accept that line of reasoning,
2 my calculation shows this is less than 5 percent of the
3 water or approximately 5 percent of IID's water supply which
4 we are talking about, 6 percent, something like that, the
5 transfer out of their water entitlement from the Colorado.

6 MS. OSIAS: Ten percent.

7 CHAIRMAN BAGGETT: Even if we argue 10 percent, or less
8 than 10 percent. At some point there will be some
9 reasonable standard at what triggers a true economic
10 impact. What would you propose that percent of water or
11 percent of fallowing?

12 MR. ROSSMANN: The questions we asked here and the
13 answers we got, your Honor, is that it is very hard to
14 predict that in advance. I think that Dr. Smith said you
15 just got to observe it.

16 CHAIRMAN BAGGETT: That is what you are asking us to
17 do. You are asking us to accept an economic impact analysis
18 argument. Then the next step under that rule is how are we
19 going to apply it, what kind of test are we going to use.

20 MR. ROSSMANN: The answer, I think, has to be a
21 procedural one rather than a substantive one. And that is
22 to set up a mechanism to ensure that if there are economic
23 third-party impacts incurred, that there is a mechanism in
24 place to quantify those impacts and ensure that the proper
25 beneficiaries receive the compensation for them.

1 This is why I think we don't have a right proposal here
2 because the proposal does not include a mechanism for that
3 to happen. San Diego's answer is, well, let the Imperial
4 Irrigation District Board of Directors disburse that money.
5 And our answer is that Board of Directors speaks for the
6 people in the Imperial Irrigation District. They do not
7 have the responsibility for social services. They do not
8 embrace, for example, all the lands surrounding the Salton
9 Sea. They cannot speak for the constitutionally chartered
10 County of Imperial that does have those responsibilities.

11 So, your Honor, I think our answer is let's look at
12 what the state Legislature is doing right now. It is
13 requiring as a condition if there is going to be a fallowing
14 component, if state law is going to be changed to authorize
15 long term, let's call it long term for the moment, if there
16 is going to be long-term fallowing, you can't do it until,
17 A, you have a plan and, B, the County of Imperial has
18 reviewed that plan to determine that there are mechanisms in
19 place to identify and mitigate the adverse economic
20 impacts. I don't think this Board can decide right now to
21 say that for every acre-foot transferred Y dollars should be
22 imputed as a loss to the economy of Imperial County and
23 ought to be redistributed. But a mechanism has to be set
24 up which hasn't been set up which could be set up.

25 Your Honor, this is just one example. When we were

1 across the street two and three weeks ago and told work out,
2 this committee is going to vote, we worked out something.
3 Most people worked out something. That is what we think the
4 Board can do of great value to all the parties here is to
5 say you all work out something.

6 CHAIRMAN BAGGETT: Would not an order conditioned upon
7 subsequent acts, I guess conditional precedence, satisfy
8 that concern?

9 MR. ROSSMANN: Yes, sir. A properly drawn order on a
10 ripe order would satisfy that concern. Yes, sir. I look
11 around me, and I hope people have a better imagination than
12 I do. We will see.

13 Let me just leave these technical areas for one point.
14 As you see, we truly heartily commend the Board to look at
15 that which they can take judicial notice of, the present
16 form of Senate Bill 482 and the language there in our brief
17 at Page 9.

18 MR. OSIAS: On that one we would object. It is not a
19 law nor is it legislative history to a law.

20 CHAIRMAN BAGGETT: Let's defer these. Take a break.

21 MR. ROSSMANN: That was a conditional argument, sir,
22 coming from Mr. Osias.

23 CHAIRMAN BAGGETT: Thank you.

24 MR. ROSSMANN: However, thankfully everybody does agree
25 that Water Code Section 1011 does apply to this proceeding

1 and only allows fallowing that is customary. Normal and
2 customary is its legislative language. And, again, if this
3 Board were ripe to make a decision, I think the parties are
4 saying that the Board could give some guidance as to what is
5 normal and customary fallowing.

6 But let's look at the only evidence in the record from
7 a farmer and from those who have actually carried out
8 something like that in PEID. And we have agreement by Mr.
9 Underwood, Mr. Levy and our farmer colleagues here that that
10 is a two-year program, that if you fallow for more than two
11 years there is a uncontroverted evidence in the record that
12 that is not customary in either the Imperial Valley or the
13 Palo Verde Valley. That is the sort of guidance, if you
14 will, that the Board could provide in an advisory opinion.

15 And two final points, your Honor. It's gotten lost in
16 some of the larger issues of the Salton Sea and the future
17 of agriculture in our state. But let's not forget our
18 domestic water supply and the 120,000 acre-feet that we need
19 during the term of this contract, and perhaps contrast that
20 with the assertions that have lately arisen that 50,000
21 acre-feet could be generated by desalination in San Diego.
22 Perhaps some guidance would be on the order that the
23 receiving area should be seeking a target to make up that
24 120,000 acre-feet that is going to be needed, the difference
25 between where we are and where we are going to be is 60,000

1 acre-feet, that that should come from desalination in the
2 area of receipt.

3 And so, your Honor, I think our dialogue has helped to
4 frame the relief that we are asking for. If this Board were
5 to make a final decision without this 25-day saving clause
6 in it, I think we would be looking at Christmas Eve when the
7 Imperial Irrigation District might sit down and try to make
8 a finding. We can't afford that delay. And although this
9 administrative process has been very helpful for us in an
10 orderly way to bring out the best evidence that everybody
11 can produce, your Honor, here I am stepping somewhat out of
12 order as an advocate for a party but speaking on my personal
13 experience it is time for the parties to sit down and work
14 it out. We don't have an awful lot of time to do it any
15 other way.

16 And I just have in mind in another July of 1986 or 1976
17 when the Los Angeles Board of Power commissioners were about
18 to certify an EIR, and I remember writing a letter to a
19 friend of mine who happened to be the city attorney of Los
20 Angeles, "Don't do it or we'll be at war for the next 20
21 years." I was off by one year. We do not need 20 years of
22 war to resolve this issue. The parties should be encouraged
23 as strongly as possible to sit down and work it out. After
24 all if the four agencies could work out the QSA, if the two
25 districts could have worked out their transfer, which

1 everyone agrees was a commendable transfer until the Salton
2 Sea entered the equation, I think now with all the interest
3 present, we can work something out. And in that respect I
4 would just, to briefly get to the interim surplus guidelines
5 and close on that point.

6 Read very clearly what Assistant Secretary Raley said
7 in his most recent guidance. He said neither extreme is
8 right. Yeah, you can't just ignore it. There will be some
9 impact. He said those who say that it will not have -- it
10 will not have any impact are wrong. But those who say that
11 there is no way for California to enjoy the interim surplus
12 guidelines are also wrong. If we can make the criteria this
13 year for 2003, we will get the water. We'll just get it a
14 different way.

15 Thank you very much, sir.

16 CHAIRMAN BAGGETT: Thank you.

17 With that, let's take ten minutes. Maybe we can get a
18 copy of those so he can deal with those. Fifteen minutes.

19 (Break taken.)

20 CHAIRMAN BAGGETT: Back on the record.

21 You got the list of cites which we couldn't find in the
22 record, and I would just as soon deal with those issues now
23 rather than after today and have to go back and excise all
24 testimony and briefs. To expedite, to continue the
25 expedited format of this proceeding.

1 So Defenders -- well, let's go with Imperial since we
2 have their motion. We had exhibits which were served. Is
3 there an objection to any of those, assuming that we provide
4 -- that Mr. Rossmann provide copies of those four documents
5 cited which were attached to his brief. I think they are
6 IID Resolutions 5.

7 Is there any problem with any of those from anybody?

8 MR. OSIAS: Three letters and two resolutions.

9 CHAIRMAN BAGGETT: Those will be admitted and the
10 numbers -- do we want to get the numbers now?

11 MR. FECKO: We will just go in order.

12 MR. ROSSMANN: Six and above, 6, 7, 8, 9 and 10. When
13 we reserve it, let me give them numbers as well.

14 CHAIRMAN BAGGETT: Thank you.

15 Now we have -- we came up with six other closing brief
16 items which weren't in the record: statement of Director
17 Hannigan, a book, a news article. Some of these we can take
18 official notice of, acts of Legislature and maybe even
19 alleged history, but --

20 MR. ROSSMANN: Let me --

21 CHAIRMAN BAGGETT: Maybe there is no objection.

22 MR. ROSSMANN: Why don't we see if there is objection
23 to any of those. And they are not all of the same color, so
24 I think there are degrees here.

25 CHAIRMAN BAGGETT: There are six items we have listed.

1 Is there any objection to any of those if you can provide
2 copies of the document?

3 MR. SLATER: As to Item 1, I am reluctant to say yes
4 until I see what it is. As to Items 3, 4 and 5, we are
5 pretty familiar with the wheeling statutes and alleged
6 history, those are three of about 5,000 pieces. We have no
7 objections to those.

8 CHAIRMAN BAGGETT: These are from Imperial County?

9 MR. SLATER: Imperial County. So Items 3, 4 and 5 we
10 have no objection to. We have no objection to 6.

11 CHAIRMAN BAGGETT: News article? Are we on the same
12 page?

13 MR. SLATER: Yes.

14 CHAIRMAN BAGGETT: History of Imperial Valley.

15 MR. OSIAS: I guess I'd object to relevance of a 1977
16 news article about the City of Los Angeles.

17 MR. SLATER: Its probative value is probably -- we will
18 leave it to you.

19 CHAIRMAN BAGGETT: Or give it the weight.

20 MR. SLATER: We have no objections to anything other
21 than Item 1, and only because we don't know the subject
22 matter of Item 1.

23 CHAIRMAN BAGGETT: Mr. Osias, do you join in that?

24 MR. OSIAS: I guess don't have an objection. I do
25 believe, for example, with respect to the wheeling bill

1 there is some alleged history even, I think, from the
2 Department of Water Resources and this Board that would also
3 be relevant. The question is in light of this will you
4 accept any other legislative history on that if somebody
5 wants to offer it.

6 CHAIRMAN BAGGETT: I don't think there'd be any
7 objections.

8 Would there, Mr. Rossmann?

9 MR. ROSSMANN: Are we -- my understanding is that this
10 was closing briefs.

11 CHAIRMAN BAGGETT: Right.

12 MR. ROSSMANN: And we can deal with, to the extent this
13 was evidentiary. But then if we are going to now have much
14 new material that no one has an opportunity to argue from, I
15 think we are getting down to slippery slope.

16 CHAIRMAN BAGGETT: This is new material.

17 MR. OSIAS: We had all of about two days.

18 MR. ROSSMANN: This is arguing from legal authority as
19 to what a measure means. And as Mr. Slater's briefing
20 recognizes, we have placed the 1810 issue in issue in these
21 proceedings. We have consistently said it applies.

22 I appreciate that counsel recognized that these are
23 things that are part of the legislative history. But I'm
24 certainly going to provide copies. But to say this now
25 reopens things, then are we going to get into reply briefs?

1 MR. OSIAS: I was not suggesting any argument. I was
2 going to say if we found other portions of that same
3 legislative history that we want to submit to you, submit
4 them without comment. If you are going to deal with 1810 --

5 CHAIRMAN BAGGETT: Then we should submit the whole
6 legislative history.

7 MR. OSIAS: Which is pretty voluminous. Unless nobody
8 cares. I am not sure I want to submit any. I just remember
9 having a trial on what it meant, and then an appellate brief
10 on that. So I have some familiarity. There may be a
11 particularly useful comment in addition to these that we
12 should submit to you, just as a submittal, further 1810
13 allege history of equal dignity.

14 I'm also prepared to not have them come in because it
15 is the last minute. Counsel had lots of time to know this
16 was part of his case.

17 MR. ROSSMANN: This is not in the form of evidence that
18 you cross-examine. This is material of which judicial
19 notice is taken. I hope for example that I don't have to
20 produce the copy of the History of the First Thirty Years of
21 Imperial Valley.

22 MR. RODEGERDTS: I thought you were going to supply us
23 all with a copy.

24 CHAIRMAN BAGGETT: I think the title page of which you
25 cite would be sufficient.

1 MR. ROSSMANN: Yes, sir.

2 CHAIRMAN BAGGETT: Maybe you can produce the rest, AB
3 as amended, legislative 2476.

4 MR. ROSSMANN: Yes, sir.

5 MR. SLATER: If I might, Mr. Chair, we will withdraw
6 our opposition to the leg history pieces on the basis that
7 this is a motion for judicial -- for the Board to take
8 judicial notice of those items. And to accommodate Mr.
9 Osias' suggestion, to the extent that we find other
10 materials relevant and want to make a motion for you to take
11 further judicial notice of other items, we will properly
12 plead that.

13 CHAIRMAN BAGGETT: That is acceptable.

14 MR. ROSSMANN: That is up to your Honor.

15 CHAIRMAN BAGGETT: I know. That is acceptable. We
16 will take all items and provide a copy of Director
17 Hannigan's statement.

18 MR. OSIAS: I have a copy.

19 CHAIRMAN BAGGETT: So the six items are admitted into
20 evidence. The numbers are sequentially after 10, 11 through
21 17. And if any other party wants to make a motion to add
22 any additional language to the specific leg history of that
23 particular bill as cited, make a motion to do so, but no
24 arguments, just language.

25 MR. ROSSMANN: To show you how agreeable we are, I will

1 submit them as evidence. For the sake of my successors I
2 hope in the future when one cites to legal authority it does
3 not have to be treated. I mean, I don't want to have to call
4 Mr. Tout here. I am sure I can probably call Bill Du Bois.
5 He could give us the entire history of Imperial County. I
6 just think in the future, I think citing material that
7 belongs in one's table authorities should not require the
8 formality. But certainly I am more than willing to
9 accommodate counsel who have been very cooperative
10 throughout this proceeding, and we will just serve copies of
11 the stuff on everyone.

12 CHAIRMAN BAGGETT: Trying to avoid lots of written
13 motions flying.

14 MR. ROSSMANN: Yes, sir.

15 CHAIRMAN BAGGETT: Defenders --

16 MR. OSIAS: Before we leave the County, not on this
17 list is the reference made in argument to draft legislation
18 which, of course, isn't legislation and the meetings that
19 took place I think he said across the street two weeks ago,
20 there is no evidentiary record of. At which time I objected
21 and you said we will deal with that at the break.

22 I renew my objection that he -- that that portion of
23 his argument was based on nothing.

24 CHAIRMAN BAGGETT: He's referring to draft legislation.

25 MR. ROSSMANN: That is correct. I will be happy to

1 serve a copy of that as well.

2 MR. OSIAS: It is not legislation. That's my point.
3 Draft legislation is not evidence of anything.

4 CHAIRMAN BAGGETT: I think we will take notice of
5 official acts and give it the weight accorded a draft bill.

6 MR. OSIAS: Before it is acted upon?

7 CHAIRMAN BAGGETT: Right.

8 MR. OSIAS: Before the bill is acted upon.

9 MR. ROSSMANN: Your Honor, I think footnote on Page 16
10 accurately describes that bill. We'll be happy to serve a
11 copy on Mr. Osias whose client had the opportunity. It was
12 three to one in those proceedings.

13 CHAIRMAN BAGGETT: We will allow it and give it the
14 weight in terms of argument. We can give it that weight,
15 and you serve it on the parties.

16 MR. ROSSMANN: Yes, sir.

17 CHAIRMAN BAGGETT: Overrule that objection.

18 Any other ones on the County?

19 MR. OSIAS: The second part was having to do with
20 committee discussions. Not even committee. Discussions, he
21 talked about going across the street. That was part of his
22 argument. There is no evidentiary record of that. He said
23 something about it. Maybe because I interrupted him, he
24 stopped. I don't know.

25 CHAIRMAN BAGGETT: I recall. I will overrule. I don't

1 quite know what you're objecting to, what the discussion
2 was, the collaborative efforts and the trying to resolve a
3 problem and reference to discussions to resolve a problem in
4 that process of resolving a problem.

5 MR. OSIAS: I think he was talking about discussions in
6 connection with this draft bill. That is how I heard it.
7 Those aren't even in writing.

8 CHAIRMAN BAGGETT: Overrule the objection. It is used
9 as an illustration of a collaborative process, not for the
10 fact of that specific discussion, but as an illustration, as
11 I recall, of how a collaborative process can be worked to
12 strike a resolution to a problem. I think if it wasn't for
13 the fact, they're in.

14 On Defenders we have five items. Is there any
15 objection to any of those?

16 I think they are all written remarks. I'm assuming
17 copies will be provided. I assume most parties have copies
18 of most of these.

19 MR. FLETCHER: I can make available copy of No. 5. The
20 first four were intended to -- at least citations of legal
21 authority.

22 CHAIRMAN BAGGETT: Unless there is objection, we will
23 take --

24 MR. SLATER: Mr. Chair, we have no objection to 1
25 through 5 or 5 and just request a copy of 5.

1 CHAIRMAN BAGGETT: Copy of 5 be provided. If you can
2 provide everybody a copy of Mr. Raley's remarks, a written
3 copy.

4 They are admitted and we will number them
5 sequentially.

6 MR. OSIAS: As a point of clarification to Mr.
7 Rossmann's argument, he also mentioned Mr. Raley's comments,
8 but I believe they were not -- they were the ones that were
9 before the House?

10 MR. ROSSMANN: Yes. They were the ones you attached to
11 your brief.

12 MR. OSIAS: I want to make sure we didn't get that
13 confused.

14 CHAIRMAN BAGGETT: Very good. With that they are all
15 admitted.

16 Let's move on to Defenders. Mr. Fletcher, you are up
17 next.

18 MR. FLETCHER: Thank you, Mr. Chairman, Members of the
19 Board, staff. My name is Brendan Fletcher. I'm here on
20 behalf of Defenders of Wildlife and Planning Conservation
21 League could not be here today, but they also join in this
22 closing statement.

23 Throughout this proceeding Defenders, PCL, the other
24 environmental organizations and other parties to this
25 proceeding have all put on evidence showing that the

1 transfer as originally proposed would have significant
2 environmental effects on the Salton Sea and in Imperial
3 County, and the San Diego County Water Authority service
4 area and along the Colorado River. Although we have focused
5 on, we meaning Defenders and PCL, have focused on the Salton
6 Sea and surrounding areas and do so in this statement, we
7 also believe that any transfer must ultimately address all
8 the environmental issues in the area of impacts.

9 A lot of folks have covered the ground that we'd
10 planned to cover in this statement already, but nevertheless
11 I think we are going to go over the issue of what this
12 project is from a less legal point of view and a more
13 practical point of view.

14 In Mr. Rossmann's statement for Imperial County he
15 mentioned that one of the harms of failure to have a defined
16 project was that this Board does not have any definite set
17 of actions from which to assess whether the action will have
18 an unreasonable impact on fish, wildlife and other instream
19 uses.

20 Now we think at this point in the proceeding it is
21 actually less clear than ever what the project will consist
22 of and what those impacts will be. At the outset of the
23 proceeding the project was fairly well defined in comparison
24 to what it is today. There may have been some important
25 details missing, but nevertheless we knew that the water

1 would be generated for transfer through on-farm conservation
2 and system improvements. We knew that endangered species
3 impacts at the Salton Sea were proposed to be mitigated
4 through a hatchery for tilapia and fish ponds to provide
5 forage for fish eating birds.

6 What we spent the first two months of this proceeding
7 on was putting on evidence showing that the original project
8 would have unreasonable impacts on fish, wildlife and
9 recreation. We saw the U.S Fish and Wildlife Service and
10 the California Department of Fish and Game had declined to
11 issue a permit for the fish pond approach, saying it failed
12 to meet the requirements of state and federal Endangered
13 Species Act. And in addition, evidence that was put on by
14 environmental organizations and others showed that the plan
15 was technically flawed and the plan did not enforce to
16 mitigate for the tremendous impact the project would have
17 caused to shorebirds of Salton Sea, water quality in
18 Imperial Valley drains, air quality and the Sea's sport
19 fishery.

20 Since the mitigation associated with HCP1 was not, in
21 the words of the wildlife agency, permittable, it was
22 removed from the final EIR and replaced with an HCP in which
23 replacement water would be provided according to a formula
24 attached to the baseline, presumably through fallowing the
25 Salton Sea and sufficient to keep the salinity at or above

1 60 parts per thousand till 2030. We have some important
2 concerns about this plan and will describe those in a
3 moment. But we do believe it represents a significant step
4 forward in recognition of the need to mitigate for Salton
5 Sea impacts from fish and wildlife through incidental
6 mitigation for sportfishing and air quality impacts.

7 Along with changing the mitigation plan, with the
8 adopting of the final HCP apparently the project itself has
9 changed in nature, although it is not clear what the actual
10 scope of those changes are. However, the final EIR stated
11 that the revised Salton Sea strategy was impracticable in
12 conjunction with on-farm conservation and system
13 improvements. In testimony the consultants for Imperial
14 Irrigation District testified that it would be practicable
15 only with some quantum left undefined of fallowing.

16 However, in its final brief petitioner IID apparently
17 opposes the revised HCP. The closing brief is filled with
18 argument rejecting fallowing which is necessary for the
19 revised HCP to be implemented. So at this point we are
20 asking once again for the most practicable point of view
21 possible. What is the project for which approval is
22 requested. It's apparently not the original project, HCP1,
23 because HCP1's been rejected by the wildlife agencies and
24 it's been removed from the final EIR. It also doesn't
25 appear to be the revised project for the revised HCP, at

1 least from IID's perspective, as IID continues its
2 opposition to fallowing.

3 And what it does appear to be, at least from IID's
4 perspective, at the very end of IID's closing brief in its
5 proposed finding and order, where it apparently requests
6 approval of the original proposal, as far as we can tell,
7 conditioned only on compliance with state and federal
8 Endangered Species Act.

9 What it appears to us, again so far as we can discern,
10 is IID's requesting approval to do anything within the scope
11 of the original project with any impact on fish and wildlife
12 that that may have, at its most severe level, as long as it
13 gets a permit from California Fish and Game and U.S. Fish
14 and Wildlife Service for the incidental take of endangered
15 species.

16 We believe that the Board lacks evidence to give such
17 an open-ended approval. This Board's obligation to protect
18 fish and wildlife encompasses nonlisted as well as listed
19 species. And the evidence put on throughout Phase II of
20 this proceeding overwhelming shows that the original
21 proposal would have an unreasonable impact on fish and
22 wildlife, both listed and unlisted.

23 Our brief goes through those effects, but I can mention
24 them briefly. The sport fishery of the Sea would decline
25 some quantum, decades earlier than it would have absent the

1 project. The fish eating birds would disappear as a
2 result. Shore birds would be affected by changes to the
3 shoreline habitat. Water quality in the drains would be
4 affected. Again affecting birds that utilize that drain.
5 In a side note, one thing that is not there from the final
6 environmental impact is how the revised report would affect
7 water quality in the drains. It appears from introduction
8 of the Final EIR that water quality in the drains would
9 deteriorate equally under any of the alternatives, including
10 the original proposal.

11 CHAIRMAN BAGGETT: Including status quo. But I guess
12 it is your position that we should be requiring mitigation
13 beyond -- let's step back.

14 You go through a lengthy discussion of potential to
15 increase temperature and increase in selenium. So, is this
16 Board obligated to mitigate for these increases beyond the
17 rate of increase caused by this transfer? In other words,
18 with the status it is going to continue to increase.

19 MR. FLETCHER: Let me just make sure I understand the
20 question. You're asking if this Board has an obligation to
21 require mitigation beyond what the impacts of the project
22 are? No, we don't believe so.

23 CHAIRMAN BAGGETT: Secondly, IID at this point under
24 HCP2 appears to, I guess, this would be my words not theirs,
25 to backstop in essence for that 12-year period or roughly

1 12 years, what the state and federal project have done, for
2 example, in the Delta. They backstopped for Phase 8. They
3 agreed to hold a certain flow and certain level into the
4 Sea. Does this not mitigate -- wouldn't that take care of
5 your concern for the impact of the project if they did what
6 they proposed and an order required them to do in essence
7 backstop for that period of time and guarantee flows?

8 MR. FLETCHER: If it required flows that would in
9 essence occur absent the project, then that would minimize,
10 probably avoid impacts to the Salton Sea. Our concern, if I
11 can follow up with revised HCP, is that the method for
12 allocated water to the Sea takes -- it begins with
13 calculation of water loss to the Sea as a result of the
14 project, and then varies from that, actually both up or down
15 as I understand from testimony in the second part, but can
16 vary significantly. The contributions to the Sea can vary
17 downward from what the project related impacts are if
18 inflows to the Sea are above what is projected under the
19 baseline. Basically that is our big concern.

20 CHAIRMAN BAGGETT: You go through a discussion in your
21 brief. On Page 14 you go through a discussion on the
22 following to mitigate, you estimate, 75,000 acres. If that
23 was IID's decision to deal with it that way, is that
24 acceptable to Defenders of Wildlife and PCL? It provides
25 the water which seems to be your concern.

1 MR. FLETCHER: Right, provides the water to the Sea.
2 As I said, it is a big step forward. We have some
3 concerns. One is water quality in the drains. As I
4 understood the project as described within San Diego's
5 brief, the idea would be basically that water would be
6 applied to fields to assist in land management. You would
7 get drainage flows to the Sea, at least in some respect that
8 are comparable to current drain flows. It is going to vary,
9 but you are going to get roughly comparable patterns. IID's
10 Final EIR seems to suggest that water quality impacts even
11 under the revised HCP would not be significantly greater --
12 significant less than water quality impacts under the
13 original proposal. I don't frankly know the explanation for
14 that. I just noted it. But the water quality impacts
15 within the drains continue to be a concern.

16 CHAIRMAN BAGGETT: That is fair.

17 MR. FLETCHER: Then the third thing is, of course,
18 under the plan the mitigation flows are scheduled to be cut
19 off in 2030 regardless of impacts. Obviously, there is a
20 chance that wouldn't be a problem. There is also a chance
21 that it would be.

22 CHAIRMAN BAGGETT: Continue. You answered my
23 questions.

24 MR. FLETCHER: So basically -- I am trying to pick up
25 where I was here.

1 CHAIRMAN BAGGETT: Take your time.

2 MR. FLETCHER: As far as the concern under the final
3 request of Imperial Irrigation District, again they are
4 requesting approval for the original project, with the only
5 thing, fish and wildlife mitigation to be in compliance with
6 Endangered Species Act. A, that the Board has a broad
7 obligation to protect fish and wildlife than to simply
8 ensure that Endangered Species Act is complied with.

9 Secondly, there is a great deal of evidence that a
10 project approved under those conditions would cause
11 unreasonable impacts to fish and wildlife at the Salton Sea
12 and in the drains, including unlisted species. And third,
13 because of the lack of definition of the project, we don't
14 really have any great sense of what might fall underneath
15 that worst case scenario.

16 So we think that the Board lacks authority or lacks the
17 evidence to approve a project based on the original proposal
18 with simply that mitigation. In fact, we would ask that the
19 Board make its finding that the original proposal does have
20 unreasonable impacts on fish and wildlife as mitigated
21 through HCP1.

22 Now we have joined the other parties and again
23 reiterated that we believe that the project has not assumed
24 its sufficiently defined form to be approved at this time.
25 However, in the event that the Board moves on this petition

1 on the current record, we closed our brief and will continue
2 to and close again with request that the Board take the
3 following actions regarding any approval that it may issue.

4 First of all, it should condition the approval as
5 described in our closing brief with a requirement that any
6 water lost to the Sea be replaced on a one-to-one basis. It
7 should require in tandem with that that the formula for
8 determining when water will be provided to the Sea and how
9 it is accompanied by adequate monitoring measures, it's
10 verifiable, it's understandable and it conforms to the
11 amount project related impact revenue than a formula that
12 may or may not do that.

13 Secondly, we request that any approved enforceable
14 plans to mitigate air quality impacts to the Sea mitigate
15 air quality impacts to the transfer, including any air
16 quality impacts that may result before mitigation water is
17 cut off as a result of some fluctuations in the shoreline.

18 Third, we request that any approval, including
19 additionally requiring the plan to make up water quality
20 impacts, and the remainder is of that request is detailed in
21 our brief.

22 Thank you.

23 CHAIRMAN BAGGETT: Thank you.

24 I have a couple of questions. They might be better for
25 Audubon, actually, dealing with public trust issues. Well,

1 let me ask you one or two real quick ones.

2 You referred to our Order 99-012 which I guess I refer
3 to the Natomas Order in your brief, where we required
4 consumptive -- proof of consumptively saved water. Argued
5 that we at that point said that they could not have
6 unreasonable impacts to fish and wildlife due to the
7 transfer.

8 Are you aware that is a temporary transfer? Here with
9 Environmental Impact Report being done and identification of
10 specific mitigation measures, I guess, there is a
11 significant difference. So, I guess, do you have any
12 comments on that?

13 MR. FLETCHER: First of all, the citations in Natomas,
14 you're right, it was a temporary transfer. I also as I
15 recall that, that order, and I hope my citation of it, it
16 indicated that any losses to river could involve
17 unreasonable impact. It didn't affirmatively hold that it
18 would. It was cited for that proposition.

19 Now, I think in the absence of evidence that a
20 reduction in inflows to the Sacramento River, for example,
21 wouldn't involve unreasonable impacts, you felt it necessary
22 to say that it could. I think the same standard would apply
23 here. Under the Endangered Species Act I think it is very
24 possible that there is none required. It does seem that if
25 you could sufficiently define the impact, that that is a

1 case-by-base determination.

2 CHAIRMAN BAGGETT: I have no other questions.

3 Thank you.

4 Mr. Wagner.

5 MR. WAGNER: Keith Wagner on behalf of National
6 Audubon Society.

7 Mr. Chair, I would like to start with just an opening
8 statement about what it is we are here for today and that at
9 least as far as Audubon is concerned was Phase II of the
10 hearing upon which this Board has to make a determination
11 that impacts of -- reasoned determination that impacts to
12 fish, wildlife and other beneficial instream uses will not
13 be unreasonable. It is important to understand what that
14 language says when we look at this statute.

15 It doesn't say that this Board has to approve this
16 transfer unless it finds impacts are unreasonable. It says
17 that this Board cannot approve this transfer unless it finds
18 that impacts are reasonable. The burden of proof is on the
19 applicants to show by credible evidence that impacts to
20 wildlife will not be unreasonable.

21 There has been a lot of evidence submitted to this
22 Board in this hearing. I have boxes and boxes of it, and I
23 know you do too. It is incredible. It shows how many
24 people care about what happens to the Salton Sea in a
25 variety of ways. This transfer started with people that

1 owned the water and people that needed the water. But it
2 grew into something much larger when the general public
3 realized all of the impacts are possible. Impacts to air
4 quality, impacts to fishing in the Salton Sea, impacts to
5 growth out of the basin. This Board at various times has
6 felt like some of these issues are issues that are before
7 this Board. At other times they felt like the issues go
8 beyond, that people are trying to bring up their issues with
9 an environmental impact report that is not up to this Board
10 to certify.

11 But what we do know at least now is that the evidence
12 that has been presented, a mountain of evidence that has
13 been presented, out of all of that there is really one major
14 document that talks to you about what the impacts are to
15 fish and wildlife and how we are going to mitigate those
16 impacts. It is the water transfer EIR and it is the HCP
17 that goes along with that transfer. These are the documents
18 that talk about how wildlife is really going to be impacted
19 and what we are really going to try to do in order to
20 minimize those impacts.

21 Unfortunately those documents don't properly recognize
22 the current status of the Salton Sea as a Public Trust
23 Doctrine resource and those documents also are flawed in
24 their general analysis in painting a bleak picture of the
25 Salton Sea that it's dead today. But it is not dead today.

1 Over 402 bird species use the Salton Sea. The Salton Sea is
2 a thriving fishery resource. The Salton Sea Authority is
3 looking at ways to try and protect the Sea into the future.
4 The federal government has asked for that to be done.

5 First of all, with regard to the public trust status of
6 the Salton Sea, this Board has stated in prior opinion that
7 the Salton Sea is not a Public Trust Doctrine resource. In
8 that decision, though, what the Board said was that the
9 Salton Sea was created in 1905 and, therefore, it does not
10 enjoy public trust status.

11 The Salton Sea was not created in 1905 any more than
12 the Colorado River was created in 1905. The Salton Sea is a
13 part of the natural geologic history of the Colorado River.

14 CHAIRMAN BAGGETT: I think you articulated that. You
15 should pass on to your colleagues it is a very well written
16 and reasoned brief. But I do have some questions on that
17 point, on the public trust issue. It is a very eloquent
18 history, I think, of the Board's actions, court's actions,
19 Mexico's actions. You go back. So we can make that
20 argument that the Salton Sea has fluctuated from zero to
21 10,000, tens of thousands of acres over the last thousand
22 years. It comes and goes, desert back and forth, back and
23 forth. The record then is pretty clear there.

24 I guess where I'm having trouble, there was a couple
25 places following this. One is under a public trust like in

1 Mono Lake, for example, you had native water flowing into
2 the lake and it is diverted to Los Angeles. The Mono Lake
3 case, everybody in this room is very familiar with Audubon's
4 court case and this Board's action.

5 In this case you had argued, and it appeared you are
6 arguing, that the Colorado River was, in fact, the source of
7 the Salton Sea over decades, centuries. So it was native
8 water under jurisdiction of this Board, and it was being
9 diverted. I think the similarities, and the case would be
10 one point. But the facts before us are that through treaty,
11 through a seven-state agreement, through acts of the Supreme
12 Court of this country, the Colorado River in essence has
13 become a foreign water body to the State of California, one
14 could argue.

15 So I guess how do we make the leap if this is foreign
16 water coming in under a public trust resource, even taking
17 for argument purposes, argument sake, that we accept all
18 your arguments that it is a public trust, in fact, the water
19 -- I guess, I'm having trouble with that one because of the
20 treaties, because there was a break, if you will, that it
21 seems to have viscerated that foreign versus native water
22 argument, which, I think, is so critical to the Public Trust
23 Doctrine.

24 Do you have any --

25 MR. WAGNER: Yes.

1 First of all, I would not go as far as to say that the
2 federal government or any act of a federal body has created
3 the Colorado River as a foreign water body.

4 CHAIRMAN BAGGETT: I am talking state water law, not
5 under federal law, certainly, but under state water law.

6 MR. WAGNER: Under state water law any actions of the
7 state that have occurred after statehood would have to be
8 impressed as well as public trust. This is exactly the
9 issue that was available in the Mono Lake decision. All of
10 the water for four tributaries to Mono Lake had been
11 allocated to L.A. And in that case what they found was that
12 there still attached even though --

13 CHAIRMAN BAGGETT: I understand that.

14 MR. WAGNER: That water, that some duty remained to
15 protect. Not necessarily that its full capacity, but some
16 duty remained impressed upon that water to serve that
17 source.

18 CHAIRMAN BAGGETT: I understand that.

19 MR. WAGNER. That it ran to.

20 CHAIRMAN BAGGETT: I understand the Mono Lake case I
21 feel fairly well.

22 This case, those permits were the purview of this
23 Board, appropriate water, L.A. We clearly had jurisdiction
24 over the City of Los Angeles in the Mono Lake case. Here we
25 clearly don't have jurisdiction over the six up for basin

1 and Arizona and the five up basin states. We have no legal
2 jurisdiction. I think we can pretty much settle the law.
3 We cannot overrule the Supreme Court of this land as much as
4 we would like to.

5 MR. WAGNER: What this Board does is assume that it has
6 jurisdiction over, and I understand that there are some
7 questions about this. This Board assumes that it has
8 jurisdiction over this hearing, over this water.

9 CHAIRMAN BAGGETT: Over whether it is reasonable or
10 whether it is --

11 MR. WAGNER: 3.3 million acre-feet of Colorado River
12 water that belongs to the state of California that this
13 Board has the power to allocate and that this water assigned
14 currently to the Imperial Valley. We are talking about
15 taking this water out of the Imperial Valley and
16 transferring it across the basin to San Diego. And to that
17 extent that the Salton Sea does have Public Trust Doctrine
18 status, this Board must consider the public trust impacts of
19 moving 200,000 acre-feet of water under its own authority
20 out of this basin and into another basin. It must make the
21 determination. That's why we are here. Must make the
22 determination that impacts to fish and wildlife are not
23 unreasonable.

24 CHAIRMAN BAGGETT: Move on to related issue. You
25 argue, I think, at length one would assume under public

1 trust or under reasonable standard which we have to make
2 transfer laws that that impact to fish and wildlife can't be
3 unreasonable. I think that is pretty clear. All parties
4 agreed to that.

5 I can appreciate your argument that the baseline issue
6 then becomes pretty important and you argue that at length.
7 I guess we can all appreciate that you didn't set the 1905
8 level as the baseline. You said it would be something other
9 than that. You cite a couple cases, I think, Lyon and
10 Fogarty, both California cases. It seems to me this case is
11 different than those two, because it is not like Clear Lake
12 or the other body cited. Here you have a situation where it
13 goes from zero, again, to tens of thousands of acres back
14 down to zero, and the level, the baseline has fluctuated
15 radically in the Salton Sea. Every decade it moves. It's
16 always a moving target except for the last few years because
17 of irrigation practices restabilized what naturally would
18 have been a fluctuating water body, more or less stabilized
19 it.

20 In fact, if there were no irrigation practices for the
21 last hundred years, what would the level of the Sea
22 naturally be? Do we even know? That is a question which is
23 beyond us. It is more rhetorical. So I guess how you
24 establish a baseline just besides its present, based on the
25 fluctuating nature of the lake? I guess I'm having a

1 problem with that from a theoretical -- from your legal
2 argument.

3 MR. WAGNER: It is a problematic question, and you are
4 right. The Salton Sea is unique. None of these cases deal
5 with these issues on point. We can cite cases like Fogarty
6 and we can cite cases like Lyon. The other side can cite
7 cases like Roman Cutter [phonetic], and we can all wind up
8 in court arguing about what the Salton Sea means.

9 Did the federal government have a duty when it accepted
10 trust from Mexico or accepted the lands from Mexico in
11 cession to hold those lands in public trust? Did those
12 lands come to the State of California in loss with that
13 trust and what water level was it? Is it the maximum level
14 of the lake? Was it the water level in 1848 when the United
15 States took possession of California? Was it the level in
16 1850 when California became a state? Is it some later
17 level?

18 The best guidance that we have are the cases that are
19 cited, at least the best guidance I could find. If the
20 Board has other authority I would like to find it.

21 CHAIRMAN BAGGETT: That is why I am asking the question.

22 MR. WAGNER: But the most we could find were cases that
23 established where there is an indication of public trust
24 status and there is the question, this Board has to make a
25 call as to what is that status. Assuming that the public

1 trust status attaches, either because of the status of the
2 water at the time of statehood or because of the status of
3 water through geologic history, the question then becomes:
4 When it is uncertain, what do you do? What do you do.

5 And the courts have said fairly clearly that the most
6 we can do is look at what the existing water level is.
7 Another practical aspect of this is the current condition of
8 the Sea. If we are to assume that the reason we are
9 protecting Public Trust Doctrine resources is for the
10 public trust uses, fishery, wading, the biological uses,
11 what we do know is that the Sea still provides excellent
12 habitat for many species, but it is in trouble. And so we
13 are essentially at a level now where to make a call -- this
14 is what happened in Mono Lake, by the way. Mono Lake, they
15 didn't say you got to leave the lake exactly as it is; you
16 can't take any water out.

17 CHAIRMAN BAGGETT: I understand.

18 MR. WAGNER: They said you can take up to the point it
19 doesn't unreasonably impact those public trust uses; and
20 that is what we are asking for for this current lake.

21 CHAIRMAN BAGGETT: You've answered my question as well
22 as you can at this point. Two other related questions. You
23 go into a lengthy discussion, and I'm sure maybe Mr. Kirk
24 when he follows will probably ask him a couple similar
25 questions, regarding tilapia. You talk at length about the

1 impact of increased temperature and increased salinity.

2 I guess one challenge I have, particularly if you are
3 going to make a public trust argument, is we are dealing
4 with an exotic specie here. Under 303(d) of the Clean Water
5 Act we are being asked by the environmental community up
6 here to list the Bay-Delta for exotic species for very
7 similar reasons for animals. This is under Clean Water Act
8 authority, under water quality law.

9 So I guess I am having some challenge coming up with
10 any mitigation measure for a specie, which if it were in the
11 Delta or, in fact, San Francisco Bay is listed for TMDL for
12 exotic species right now, and there is a whole plan. There
13 is legislation in place. It's been a cause celeb in the Bay
14 Area by the environmental community to rid the Bay of exotic
15 species, yet here we are being asked to mitigate to allow a
16 species, which I think the evidence as I recall is five
17 times its natural occurring density is occurring in the
18 Salton Sea over what would occur in Africa. And we're being
19 asked to mitigate and set up a whole scenario to allow this
20 to continue.

21 I guess, how to reconcile that with the public trust
22 argument and Fish and Wildlife and Fish and Game, probably
23 ask them how they justify continuing the exotic species,
24 which in my home in Yosemite National Park we would be
25 trying to get rid of. The Park Service has prohibited

1 stocking of trout in high Sierra lakes because they are
2 exotic to those lakes. How do you -- do you have any --

3 MR. WAGNER: The best answer I can give you is context.
4 Context is everything in the environment. These fish are
5 the fishery that the Salton Sea supports. They are not in
6 the process of threatening other existing native species,
7 and if they were there would certainly be a drive to be
8 making adjustments to the biological balance. What these
9 fish do, however, is an incredible service to the avian
10 resources of this state and of the United States.

11 The Delta and the Colorado River is hammered. Tulare
12 Lakes are gone. Owens Lake is gone. Mono Lake almost
13 followed. Salton Sea is really one of the last best
14 stopovers for these birds. And to the extent that these are
15 nonnative fish -- we could also talk about recreational
16 interest and commercial interest for these fish because even
17 the Salton Sea Authority has looked at those issues as well.

18 CHAIRMAN BAGGETT: I understand.

19 MR. WAGNER: Which are valid uses. But the existence
20 of these nonnative fish in this context is extremely
21 appropriate and extremely important to the public trust
22 values and to the wildlife. And you have to understand with
23 our briefs it is not a question of, well, we find it is not
24 a Public Trust Doctrine resource, therefore, we can ignore
25 the rest of it.

1 There are two sets of issues going on here.

2 CHAIRMAN BAGGETT: I understand that.

3 MR. WAGNER: Where even if we decide that there is not
4 a public trust status, which we would encourage the Board
5 not to go in that direction, there is still public trust
6 values associated with the Salton Sea.

7 CHAIRMAN BAGGETT: So let's continue that argument,
8 then.

9 Then would it not be appropriate for this Board to
10 craft an order which basically bases the mitigation or
11 defers it, if you will, through the HCP accepted by the fish
12 agencies whose clear role it is, Fish and Wildlife, Fish and
13 Game, are the experts. They are the ones under state and
14 federal law that are charged with protecting the endangered
15 species, the pelican, et cetera. So would that condition
16 not satisfy Audubon's concerns, if it was conditioned upon
17 approval by Fish and Wildlife and Fish and Game through
18 their HCP context, would that satisfy your concerns that
19 fish and wildlife are adequately protected?

20 MR. WAGNER: Given the number of parties that have
21 shown interest in this litigation, for Audubon to presume
22 that mitigating impacts to fish only would be a sufficient
23 basis for a contingent order by this Board would be
24 premature at this time.

25 What Audubon would really encourage this Board to do is

1 follow up on the suggestion of Mr. Rossmann, who has
2 suggested that really what this Board should understand is
3 that this hearing has crystalized a forum for the parties to
4 sit down and figure out what is going to be most acceptable
5 to them. If this Board approves an order with contingent
6 listing out, list out a hundred conditions, if you like, we
7 approve this if you do -- if you get HCP approved by these
8 folks, if you do this much financial or economic mitigation
9 for Imperial County, somebody is not going to be happy along
10 the way, and you are going to lead to the 20 years of
11 warfare that has been referred to already.

12 If this Board takes this opportunity instead to deny
13 this petition as not ripe at this time or because of the
14 fact that it simply just lacks the credible evidence that it
15 needs to make the necessary determination, and then issues
16 some advisory guidance, whatever the Board feels is
17 appropriate as to what an appropriate set of circumstances
18 might look like and allows the parties to go back and come
19 back with a revised proposal.

20 This Board's position, you asked a couple of earlier
21 parties whether it is this Board's position to step into the
22 middle of the contract and start negotiating while this is a
23 third party on what the terms of this transfer will look
24 like. We would submit that it is probably not appropriate
25 for this Board to take that kind of action. This Board sits

1 in a judicial type of role to determine whether what it is
2 presented meets the standards required by California law and
3 by the Board's own regulations.

4 CHAIRMAN BAGGETT: I have a couple final questions. I
5 neglected to ask Defenders and PCL this question. I am sure
6 Audubon is probably -- maybe Salton Sea might have more
7 expertise, anyway. Do you have concerns, there has been a
8 following bantered back and forth as an alternative or
9 partial alternative? Do you have any concerns about its
10 impact on the avian resource?

11 MR. WAGNER: Yes, we do.

12 CHAIRMAN BAGGETT: I don't have any other. Do you have
13 any other --

14 MR. WAGNER: If I may conclude with a few remarks
15 briefly that we have not touched upon.

16 We have discussed the Public Trust Doctrine at length.

17 CHAIRMAN BAGGETT: At length.

18 MR. WAGNER: What we would move on to are these
19 questions of the adequacy of the analysis of EIR, the HCP
20 and its assumptions. First of all, as it's been submitted,
21 this Board does not have a proper project in front of it
22 upon which to make a determination. An integral part of
23 this project is the HCP. The first alternative of the HCP
24 has been rejected by the Department of Fish and Game. The
25 second HCP has been rejected by the participants. Between

1 the two, there is no way for this project to work.

2 Second of all, when we discuss the baseline problems,
3 the answer that we got in the final EIR was that there is
4 case precedent, Save our Peninsula that allows a rejection
5 of a baseline into future.

6 I would urge the Board to carefully read the actual
7 outcome of that case. Save our Peninsula looked at a
8 situation where water usage was projected three and a half
9 years into the future. A lot of great language for the
10 project proponents in the case, it talked about how, under
11 certain circumstances, a baseline other than existing
12 circumstances should be allowed to be used. Ultimate result
13 in this case was that because of the potential or, first of
14 all, because it was unclear what would actually happen under
15 the projection, and second of all due to the projections
16 capability of being manipulated in favor of approving the
17 project, that it was not appropriate to use a
18 three-and-a-half-year projection and instead that they
19 should use the existing baseline for the project.

20 This project they would take it to the extreme of
21 projecting 75 years into the future and declare the Salton
22 Sea already dead. It is boggling when you look at the
23 actual holding of the case despite -- you can pick language
24 out of the case out of context anytime you want. Look at
25 what the actual holding was in that case. Seventy-five

1 years from now not many people left in this room are going
2 to be standing. But that doesn't give a basis for injuries,
3 that doesn't give a basis for impacts to air quality to be
4 on it to breathe, that doesn't give a basis for unacceptable
5 pollution in our environment and it is the same type of
6 situation with the Salton Sea. You've got to look at the
7 existing conditions now.

8 It is also interesting to note that you should look at
9 the air quality analysis as compared to the Salton Sea's
10 baseline analysis. Salton Sea baseline is protected for 75
11 years without taking account of any of the restoration
12 efforts that are being undertaken to give us worst case
13 scenario. They want to give us the worst case of what could
14 happen with the Salton Sea. What that does is work unfairly
15 to the project opponent's favor. What we should be looking
16 at is a baseline that incorporates reasonably predictable
17 measures if we are going to be looking at a future baseline
18 at all. Looking to the future as to what are the
19 alternatives, you will see that the Salton Sea may not die
20 in 17 years, 30 years, 75 years, but may be thriving in the
21 future.

22 As we stated in our brief what has happened here is
23 that IID has presented this Board with its wishful thinking
24 in the shroud of a computer model in order to give it the
25 appearance of scientific validity. That model is not the

1 truth. That model is not the Salton Sea. That model is a
2 prediction.

3 Also just to briefly touch on it, this Board does have
4 the duty to look at the impacts to fish, wildlife and
5 instream beneficial uses. Nothing in the Water Code says
6 that those uses do not have to be in the basin where the
7 transfer occurs from, that they should also -- and we would
8 submit that the Board should also look at those impacts in
9 out-of-basin areas. We understand there are issues in terms
10 of this Water Board not approving, not having the
11 jurisdiction to say approve development projects or have
12 control over sprawl in San Diego. But to the extent that
13 this project will provide guaranteed water from a senior
14 water source that will allow San Diego to grow.

15 San Diego says this only replaces existing water, but
16 the fact is the existing water is projected to serve
17 existing growth up for the next 12 years. So there is
18 projected growth in the existing water supply to San Diego.
19 And that growth would be impacted. The ability of San
20 Diego to carry that growth out is impacted as to they are
21 going to have a senior water right under this transfer or
22 whether their rights are only contingent through an
23 agreement with MWD.

24 So to close, we just want the Water Board to know that
25 in general Audubon recognizes that water is a scarce

1 resource and becoming scarcer in California. And it is
2 important to look for solutions for nonurban communities and
3 for agricultural communities and for the environment. We
4 oppose this transfer as it is currently proposed because we
5 don't know what it is. We don't know what this project
6 is, and we would not encourage this Board to come up with a
7 series of Band-Aid solutions to try to patch up what the
8 parties have not quite put together yet.

9 What we would encourage is for this Board to deny the
10 current petition as unripe for decision and that it gives
11 some guidance and also some suggestions to the parties that
12 they get together. The parties have shown such an extreme
13 interest in the Salton Sea resources and come back to this
14 Board with a proposal that more adequately suits all of
15 their needs and is more concrete in a form that this Board
16 can approve.

17 Thank you.

18 CHAIRMAN BAGGETT: Thank you.

19 I do have a question. National Wildlife is not here, I
20 assume.

21 MR. WAGNER: No, sir.

22 CHAIRMAN BAGGETT: You want to deal with the growth
23 inducing impacts?

24 MR. WAGNER: Sure. I will do my best.

25 CHAIRMAN BAGGETT: I notice you are getting into that

1 to some extent.

2 Sierra Club I assume isn't here either.

3 There was substantial amount of evidence early on -- I
4 don't know if you were here -- presented by San Diego
5 showing the urban water management plan as managed by the
6 loss, showing what their need of water was in the future.
7 And just let's assume it was somewhere around a hundred
8 thousand acre-feet. And then they showed where that water
9 was coming from. It was ag conversion, which is an issue
10 not -- which I realize is an issue for Audubon and National
11 Wildlife, but it is certainly not something this Board has
12 authority over, how San Diego County does their land use
13 planning.

14 There was desalinization project proposed over the next
15 20 years. There was increased use of reclaimed water from
16 wastewater treatment plants. And there was an increased
17 management in recharge conservation methods in recharging
18 groundwater, which penciled out actually, as I recall the
19 testimony, showed slight surplus, a few thousand acre-feet
20 over what was projected by this document as required by law
21 under field analysis. I really fail to see how one could
22 argue that that is growth inducement if this is merely
23 shoring up, if you will, and providing existing water
24 supply. This transfer would take the place of buying water
25 from somebody, be like having the money in your savings

1 account instead of borrowing. I fail to see how that is
2 growth inducing.

3 MR. WAGNER: The reason why would be the assurances
4 associated that are associated with that. Many of these
5 projects that we are talking about are contingent projects,
6 may occur or may not. Desalination, is it happening now?
7 What is it going to take?

8 CHAIRMAN BAGGETT: Under their urban water management
9 plan and under the laws as the law now stands they would be
10 prohibited -- unless they built those projects or had them
11 in the pipeline.

12 MR. WAGNER: Exactly. So if they use this water to
13 replace that, then it is not an issue.

14 CHAIRMAN BAGGETT: The facts I think before this Board
15 in evidence shows that this water is merely replacing an
16 existing --

17 MR. WAGNER: What this water replaces --

18 CHAIRMAN BAGGETT: Sale from the Met.

19 MR. WAGNER: Yeah, exactly. What that sale from the
20 Met is a junior water right and it is a contingent
21 sale. There is no guarantee that that water will show up in
22 any given year. That could lead to some concern about
23 approving certain growth projects, where, if you know that
24 you have a guaranteed access to 200,000 acre-feet for the
25 next 75 years from a senior appropriator, then all of a

1 sudden the ominous question of water no longer lingers as
2 badly in the air.

3 CHAIRMAN BAGGETT: It could also be -- I guess I would
4 -- it could be argued that that would give the leaders, if
5 you will, of San Diego credit for wanting to remedy a past
6 error in having allowed this growth to occur on temporal
7 water supplies. Now they have seen maybe the error in their
8 ways and going back and remedying what past Boards of
9 Supervisors or city, whoever did it, allowed this growth to
10 happen on a very --

11 MR. WAGNER: We are not talking about just past growth.
12 This water will serve growth up to the year 2012 according
13 to their own application. Some of this growth has occurred
14 already. Some of this growth has not yet occurred and has
15 yet to be approved. And, yes, there are alternate water
16 sources out there.

17 In one sense I understand your dilemma in that, hey,
18 they could be doing this, they could be doing that. We are
19 just supplying the water that they could get from other
20 places. We don't know that those other projects are going
21 to happen and neither do the people in San Diego who would
22 be approving those projects, what the cost would be. If
23 desal costs ten times as much as this water does, does that
24 project ever get approved.

25 I understand, and the next question is, well, how does

1 that effect us because we don't care where they get the
2 water from necessarily because it is a question -- we are
3 not here to decide about land use. But you are here to
4 decide about land use to the extent that streams and
5 instream uses will be impacted in is San Diego. This water
6 transfer will allow impacts to existing streams and water
7 bodies in San Diego as they are graded and paved over,
8 filled in for future development.

9 CHAIRMAN BAGGETT: Okay.

10 Thank you.

11 With that, Salton Sea Authority.

12 Nobody is here from Sierra Club. Nobody from National
13 Wildlife. Colorado River Tribes.

14 Salton Sea Authority.

15 MR. ROSSMANN: Mr. Chairman, may I just put a thought
16 out that we might all think about over lunch. If we have
17 time, since we didn't have testimony today, whether we can
18 have further dialogue with the Board. Your Honor has asked
19 questions that we dealt with in our brief. We are here for
20 the Board. We are here to serve you by this argument, not
21 just to hear ourselves talk. A lot of what you had the
22 dialogue just with Mr. Wagner is stuff that we have some
23 answers for.

24 CHAIRMAN BAGGETT: I appreciate that. It was there. I
25 could only pick and choose here.

1 Thank you.

2 MR. KIRK: Mr. Chairman, first I want to note that the
3 Regional Water Quality Control Board couldn't be here today.
4 If I needed, they've agreed to offer me the balance of their
5 time. I don't think I will actually need that, however. It
6 appears that the Board has been somewhat flexible with
7 respect to amount of time.

8 I would like to thank you, Mr. Chairman, Director and
9 staff and, in fact, the rest of the participants and the
10 petitioners. You have all been very patient with me and the
11 other nonattorneys here as we muddle through some of the
12 procedural aspects of this hearing. So, again, thanks for
13 doing that.

14 I do want to reiterate that the Salton Sea Authority is
15 generally supportive of the Quantification Settlement
16 Agreement. However, as you have heard, we are very
17 concerned about the proposed project and its impacts on the
18 Salton Sea. And I would like to join with every one of my
19 predecessors this morning and suggest that I am not sure
20 what the project is. We have heard one proposed project as
21 part of the Draft EIR, and I believe, as Mr. Fletcher, I
22 believe, stated that the project is less defined today than
23 it was in the first days of this hearing.

24 We continue to hear from IID that they are seeking
25 approval from the Board for a transfer that prohibits

1 following. However I actually agree with San Diego County
2 Water Authority's closing brief when they say given that the
3 Final EIR recognizes the impracticability of utilizing all
4 measures, conservation program in concert with the proposed
5 HCP, it is reasonable to conclude that the all measures
6 conservation program, as presently described, would not be
7 employed in favor of a fallowing program.

8 I think it was Mr. Du Bois who indicated that he
9 believed that the Final EIR seems to suggest a fallowing
10 project. It is, in fact, the way I read it as well.
11 Although reading IID's closing brief, it would seem to
12 indicate that they will not be pursuing a fallowing
13 project.

14 To your point that perhaps the details aren't
15 important. We can perhaps approve --

16 CHAIRMAN BAGGETT: I don't think that is quite how we
17 phrased it. The details are important, but are those
18 details up to this Board?

19 MR. KIRK: Perhaps the timing of those details. The
20 point, I think, you were making that it is typical in a
21 highway project, as an example, that a project could be
22 permitted, the EIR/EIS complete, and then the project would
23 go into final design. I am somewhat familiar with those
24 projects as well.

25 I'd say this project is somewhat similar. We are not

1 asking IID to identify if it is Mr. Du Bois' property that
2 will undergo temporary fallowing or on-farm conservation or
3 his neighbor's property. What we are asking is what is the
4 project, what are the nature of impacts. We are still not
5 clear what the nature of the project is. We have some
6 indication of what some of the impacts might be.

7 With respect to a road project, one could imagine that
8 the federal government or state government identifying a
9 project to move from point X to point Y and that would
10 travel through an important wetland. Well, that could have
11 major, very important fish and wildlife impacts. An
12 alternative to that project may be routing around a wetland
13 or it might be transporting people from point X to Y in some
14 other form. That is what we are left with here is
15 one alternative that has very significant impacts on an
16 important national wildlife refuge and the Salton Sea and
17 another project that may not. And we are not sure which
18 project is before this Board. So I join with the others
19 asking for more definition and it appears that the project
20 is not ripe for your decision making.

21 Regardless of the ambiguity of the project, I believe
22 the Board can proceed in a few key areas. One, I think this
23 Board ought to make a finding that the Sea is a rich
24 biological resource. I believe that that is uncontested.
25 There has been a tremendous amount of testimony on the

1 importance of the Salton Sea to the Pacific Flyway. In
2 fact, even IID's own EIR, the existing conditions
3 description in that EIR supports a finding that the Sea is a
4 critical biological resource, critical to the Pacific
5 Flyway. Neither IID nor San Diego County Water Authority
6 offered any experts to testify that the Sea was, in fact,
7 unimportant.

8 Unfortunately every time somebody tries to move water
9 from the Imperial Valley, they try to downplay the
10 significance of the Salton Sea. They also try to project
11 the Sea's demise much sooner it otherwise seems to occur.
12 Unfortunately, this Board did it 20 years ago with Decision
13 1600 when they said the Sea would not support a fishery
14 within five years. That is obviously not the case today.
15 Unfortunately, IID is now claiming the Sea is a poisonous
16 place that will collapse soon.

17 The closest that the petitioners came to suggesting
18 that the Sea was more of an attractive nuisance than it was
19 an attractive habitat was to download information from the
20 Internet on avian botulism and selectively wave that around
21 during cross-examination, suggesting that wildlife disease
22 is a major issue at the Salton Sea. I am not here to
23 suggest that it isn't. In fact, wildlife disease is a major
24 issue at the Salton Sea. However, we did bring experts on
25 wildlife disease. In fact, we brought the world's foremost

1 authority on wildlife bird disease who came here and
2 testified along with U.S. Fish and Wildlife Service. And
3 they made the point that the information downloaded off the
4 Internet was provided out of context.

5 What we heard is that less than 1 percent of the birds
6 at the Salton Sea on an annual basis regularly succumb to
7 wildlife disease. And despite this expert's -- despite Dr.
8 Friend's deep concern about wildlife disease at the Salton
9 Sea and up and down the Pacific Flyway, Dr. Friend calls the
10 Sea a crown jewel of avian diversity. I believe this Board
11 should do the same.

12 Like some that preceded me, I have generally been
13 focused on the Phase II aspects of the hearing for some
14 obvious reasons. And with respect to the question does the
15 proposed project have unreasonable impact on fish and
16 wildlife resources, I say, yes, particularly the proposed
17 project that we saw in the Draft EIR. I apologize for going
18 back and forth between the draft and the final. But again
19 we are not sure what the proposed project at this stage is.

20 It has been shown that projects that reduce inflows to
21 the Sea have unreasonable impact on the fish and wildlife.
22 At the start of the hearing the petitioner's counsel claimed
23 if the wildlife agencies grant a permit for HCP1 then that
24 Board could determine there is not an unreasonable impact,
25 deferring what I believe ought to be within the Board's

1 discretion, to the Fish and Wildlife Service and Fish and
2 Game.

3 As the Chairman notes, the experts out there are not
4 actually sure about that in some cases. I believe that you
5 actually received more testimony and expertise as a part of
6 this process than perhaps the Department and Service have
7 used in their process. In fact, this proceeding I believe
8 led to a conclusion that HCP1 was unreasonable. It was this
9 tail that wagged that dog, not the other way around.

10 We have now learned, of course, that HCP1 will not be
11 permitted. Thus the Board should conclude that HCP1 could
12 have an unreasonable impact. The weight of the evidence
13 supports that the Board should conclude that the project,
14 the draft project in the EIR, Draft EIR, and along with HCP1
15 will have unreasonable impact on fish and wildlife
16 resources. It will also have an unreasonable impact on the
17 water quality in the tributaries and drains in the Imperial
18 Valley.

19 You might consider this request to be kicking a dead
20 horse in some ways. HCP1 is gone. We've actually heard
21 that HCP1 may not be gone. We have heard from various
22 parties in Imperial Valley and their Congressional
23 supporters that HCP1 should be resurrected. For that reason
24 I'm suggesting that the Board kick that dead horse.

25 MR. OSIAS: Just illustrative.

1 MR. KIRK: That is just illustrative. Mr. Osias is
2 always checking my --

3 There is also unreasonable impact on fish and wildlife
4 because of impacts on restoration. Mr. Wagner addressed
5 this to some degree. I'll focus some attention on it as
6 well. Restoration, I believe, as this Board knows is in
7 large part about sustaining environmental values. IID in
8 its closing brief claims that no one has offered any money
9 to save, restore or preserve the Salton Sea. Restoration is
10 not a single event. There it is, a highway project.
11 Restoration of the Sea has already begun. Do we have enough
12 political will, enough resources and enough money, enough
13 capital to finish restoration as this stage? Absolutely
14 not. We are a long way from it. But neither does Lake
15 Tahoe, neither does CALFED. None of the major restoration
16 projects in the state have all of the resources that they
17 need to finish their restoration work.

18 What I can tell you is that resources supporting
19 restoration work at the Salton Sea have gone up 5,000
20 percent in the past five or six years. Now statistics, as
21 we've all heard, can be misleading. One reason that is such
22 a big number is that we started with such a small number,
23 just a few thousand dollars a few years ago. The
24 appreciation for the Salton Sea has gone up. We are not
25 simply studying the Salton Sea, although studying the Sea

1 has been important to establish the bounty of the
2 environmental resources of the Salton Sea. And you have
3 seen some of that from the expert testimony that you have
4 heard over the course of the past two months.

5 We are also doing things like wildlife disease
6 programs. We know wildlife disease is a major problem. We
7 have not had a major event like 1996 again because we are
8 out there managing the resource. This is a massive
9 resource, millions of birds. And in 1996 the Fish and
10 Wildlife Service and the Department of Fish and Game were
11 caught off guard. Today that is not the case because
12 restoration is beginning. We are managing this resource.
13 We are also cleaning up beaches. We are also undergoing
14 salt extraction pilot projects.

15 To the question can restoration occur, I say, yes, it
16 can occur. And to the question is restoration expensive, I
17 say, no, it is not under historic inflows or nearly historic
18 inflows. Under those scenarios you can restore the Salton
19 Sea. It is not magic. You can go out to the Cargill
20 operation in San Francisco Bay. You can go out to the
21 Guerrero Negro. There are lots of places where we pull out
22 lots of salt. In fact, some of those operations would be
23 larger than the one at the Salton Sea.

24 Approving a transfer project that significantly reduces
25 inflow, flows to the Salton Sea, forecloses an opportunity

1 to restore the Salton Sea. Reduced inflows drive up the
2 size, cost and complexity of restoration, and that is
3 uncontroverted. Reduced inflows -- oftentimes it is a
4 mantra that the Salton Sea Reclamation Act was supposed to
5 fix all of this by proposing a project which addressed those
6 reduced inflows. Congress in the Salton Sea Reclamation Act
7 did not say the federal government, the state nor the Salton
8 Sea Authority would fix the problems associated with reduced
9 inflows. What it said is evaluate a project under those
10 conditions. Study after study, and you've got several of
11 those studies in the record now have done that. They looked
12 at what it takes to restore the Salton Sea under various
13 inflow conditions. Again, the evidence is all over the
14 record. You reduce inflows, you reduce the elevation of the
15 Salton Sea, you increase salinity and restoring the Salton
16 Sea becomes next to impossible.

17 Before I conclude, there are a couple of ironies I
18 suppose in this proceeding. On one hand, as Mr. Rodegerdts
19 pointed out, we have heard from some that we shouldn't be
20 focusing so much on the EIR and CEQA and NEPA issues. I
21 believe it was Mr. Rodegerdts that pointed out that is what
22 we have on the table. That is our best definition of the
23 project and our best definition of impacts. So we must
24 focus on it. And while we are told on one hand not to focus
25 on CEQA and NEPA issues, on the other hand there's been a

1 lot of emphasis on the Salton Sea restoration EIR. In some
2 cases to point out that it is inadequate and in other cases
3 it is being used to support the petitioners' claims.

4 On one hand we are being told that there are great
5 flood risks at the Salton Sea, and I actually concur, there
6 are flood risks at the Salton Sea today, and with increased
7 inflows there would certainly be flood risks at the Salton
8 Sea. So that is an issue. Is it an issue if elevations at
9 the Salton Sea drop by five or six feet? I doubt it. And,
10 in fact, we have also been told that IID itself has perhaps
11 the most expensive property, or at least leases, the most
12 expensive and the most flood prone property around the
13 Salton Sea. Think that is a factor as well.

14 We have also been told that particularly in Phase I,
15 that the IID is the most efficient water district in the
16 western hemisphere or at least state of California or at
17 least Southern California. I'm not sure which. And to
18 squeeze out more water out of this very efficient district
19 will require a significant amount of resources, particularly
20 from urban partners. You heard the same thing 20 years ago
21 as a part of the IID-MWD deal.

22 So IID is very efficient, requires lots of money to
23 become more efficient to make this deal work. On the other
24 hand, what we hear is that IID could conserve 59,000
25 acre-feet of water without doing anything at all. Where is

1 that? That is in the baseline of the entitlement
2 enforcement. So on one hand we are being told that they are
3 the most efficient and they need lots of money to become
4 more efficient. On the other hand when it serves to
5 accelerate the demise of the Salton Sea we are being told
6 that they can conserve 59,000 acre-feet without lifting a
7 finger.

8 My recommendations to the Board: This Board ought to
9 request the petitioners provide a detailed failed
10 project. I believe, as I believe some of the other
11 participants, that a revised draft EIR ought to be reissued,
12 issued, and recirculated. The hydrological assumptions in
13 that document ought to be transparent and defensible.

14 Such a recirculation would also give time to pursue
15 Mr. Rossmann's suggestion of a consensus process that
16 involve the participants of this hearing and perhaps
17 others. It seems that the so-called win-win scenarios that
18 have been constructed have been constructed by the water
19 users. Other participants, particularly the farmers, the
20 county and the environmental interests, should be at the
21 table.

22 If you feel you must approve a project, and I
23 understand the time crunches and great crush on this Board
24 to do so. I believe you ought to condition it on doing no
25 harm to the Salton Sea and no harm to the Salton Sea's

1 restoration. And what that means is maintaining historic
2 inflows from IID. At best the project should avoid the
3 water quantity and quality impacts on the Salton Sea and its
4 rivers and should avoid potential air quality impacts. At
5 worst those impacts should be mitigated one to one for the
6 duration of the project. Let's not tie this to an
7 artificial baseline. Let's mitigate project impacts one to
8 one and inflows to the Salton Sea should not change over
9 time.

10 Approving a transfer project that irreparably harms the
11 Sea is not in the best interest of birds of the Pacific
12 Flyway. It's not in the best interest of the lungs in
13 Imperial Valley or Coachella Valley. It's not in the best
14 interest of the economy of southeastern California and it's
15 not in the best interest of the state of California.

16 Thank you for your consideration of my closing
17 arguments.

18 CHAIRMAN BAGGETT: I have a few questions. Obviously,
19 we are going to be back after lunch now.

20 I guess one regarding the flooding. Is it reasonable
21 to require -- you are well aware of this Board's prior acts
22 based on reliability to IID and flooding caused by
23 oversubscribing to the Salton Sea as a drain. So is it
24 reasonable for IID to maintain its current level given that
25 fact that there is a current liability, there is current

1 flooding which we have all agreed comes and goes? So is the
2 current level really reasonable?

3 MR. KIRK: Is the -- I wouldn't actually suggest that
4 the Board rule on the level of the Salton Sea. What I would
5 suggest is that the Board rule on the inflows provided by
6 IID. Under IID's baseline, the inflows to the Sea drop
7 significantly even without the project. So even if this
8 Board were to rule that project not go forward, it appears
9 that the risk of liability goes down.

10 CHAIRMAN BAGGETT: So I guess the follow-up question:
11 What level would you suggest so you aren't suggesting a
12 performance based as opposed to a project specific?

13 MR. KIRK: I would suggest, and, in fact, Mr. Osias at
14 one point objected to a line of questioning because he
15 thought I was referring to elevation when I was referring to
16 salinity. Unfortunately, there is a real direct link
17 between the two. As you drop the elevation of the Sea, you
18 increase salinity.

19 My Board has taken the position that the Salton Sea
20 ought to be maintained around elevation 230, which is two to
21 three feet below its current elevation. So the Salton Sea
22 Authority itself recognizes that the beneficial uses of the
23 Salton Sea could be best maintained at a slightly lower
24 elevation. We would prefer to achieve that elevation by
25 extracting salt--

1 CHAIRMAN BAGGETT: I understand.

2 MR. KIRK: -- than by reducing inflows.

3 CHAIRMAN BAGGETT: Couple more questions.

4 The question I asked the previous, Audubon: What is
5 the Salton Sea Authority's position on fallowing? It seems
6 pretty clear from the record that fallowing could accomplish
7 certain goals that you agree with. 75,000 acres has been
8 thrown out. Is that acceptable?

9 MR. KIRK: From -- the Authority hasn't taken a
10 specific position on fallowing. Personally, I believe that
11 that offers the most environmentally benign way of
12 proceeding with this water transfer. I appreciate Audubon
13 and probably the Service and Department of Fish and Game's
14 concerns about environmental impacts on land. If the
15 program was to proceed with a rotational based process,
16 where no land was permanently fallowed and where perhaps
17 cover or perhaps some water was provided periodically, I
18 suspect that impacts to terrestrial species and to birds
19 that use some of the drains and some of the burrows in the
20 area could be adequately mitigated. Of the projects
21 presented in the Draft EIR, the final, fallowing is the
22 environmentally superior alternative. In that sense I
23 concur with IID's Final EIR.

24 CHAIRMAN BAGGETT: Lastly, you in your closing brief
25 argued, like, \$250,000,000 is what you're estimating the

1 Salton Sea fix is. Then you talk about annual maintenance.
2 You didn't break that out. What is it ongoing? Say nobody
3 comes up with a \$200,000,000 matching bullet to put in place
4 these programs, what's the annual maintenance cost?

5 MR. KIRK: In fact, the \$250,000,000 included annual
6 maintenance. The \$250,000,000 estimate that has been
7 bandied about is a present value estimate. It includes the
8 capital value of the project along with ongoing maintenance
9 forever. But for the purposes of statistics, it generally
10 included about 17 years of O&M built into that PV.

11 The project could be 300-, could be 400,000,000. In
12 terms of if you want it --

13 CHAIRMAN BAGGETT: Like any good water project.

14 MR. KIRK: If you want to get a ballpark figure on O&M
15 cost, the capital costs of the solar evaporation ponds, for
16 example, is a much greater component compared to O&M.
17 Managing water flowing through the system, if you've ever
18 been out to the Cargill operation, you will have a hard time
19 finding an employee on their 40,000 acres of land. We
20 estimate the O&M cost to be on the order of 10- to
21 \$20,000,000 per year. That doesn't include just managing
22 salt projects, but the other things we'd like to do as well,
23 fishery management, et cetera.

24 CHAIRMAN BAGGETT: You've got a statement here that
25 puzzles me, towards the end of your brief. Before your

1 recommendations you say, quote: Even if all the political
2 financial support were available within a few years, it is
3 unlikely that restoration could in current time preserve a
4 fishery at the Sea and the value that that fishery
5 supports.

6 MR. KIRK: Under the scenario of a reduced inflow. If
7 you were to reduce -- that is in a paragraph, if you look a
8 little further up. We describe the practicality of -- what
9 page are you on, Mr. Chairman?

10 CHAIRMAN BAGGETT: Anyway, I will go back.

11 It wasn't clear.

12 MR. KIRK: The point we were trying to make is if
13 inflows to the Sea drop, cost of restoration goes up. You
14 can understand why that would be.

15 CHAIRMAN BAGGETT: Okay. That is fair. I understand.

16 MR. KIRK: Finances were there, could you do it in
17 time? We don't believe so.

18 CHAIRMAN BAGGETT: The question Audubon raised in their
19 brief, again, something that is obviously -- I've been
20 struggling with this whole public trust argument. If, in
21 fact, the Sea is or was a naturally fluctuating water body,
22 I guess, body to body and back again -- you answered to some
23 extent. I guess the argument, your argument, would be that
24 the protection of the habitat for the flyway is worth
25 artificially sustaining a level which wouldn't have been

1 sustained under a natural flow regime?

2 MR. KIRK: Yes. It is one of the challenges we have
3 had all along with the project is what is the natural state
4 of the Salton Sea. We have tossed that aside, and we've
5 said what are the values which we are trying to sustain. We
6 are trying to sustain the fishery for the birds, whether
7 that is based on exotic and some closely related native
8 fishery, the corvina for the Sea of Cortez, et cetera, we
9 are focused on the performance objectives, not some
10 artificial target date of 1965 or 1595. We are looking at
11 about 230 feet below sea level, and we'd like to maintain a
12 marine-like setting with a very strong and healthy fishery.

13 CHAIRMAN BAGGETT: So basically, the argument is this
14 is one giant mitigation bank for the Pacific states?

15 MR. KIRK: You're right. In fact, we said it before.
16 If there was some way for us to target all development and
17 wetlands in the State of California, and if this Board would
18 like to rule on that, probably a few folks would actually
19 join in that. It is mitigation for the development of
20 wetlands up and down the Pacific Flyway, particularly in the
21 state of California which has lost more than its fair
22 share.

23 CHAIRMAN BAGGETT: Very good. No other questions.

24 Thank you very much, Mr. Kirk.

25 MR. KIRK: Thank you.

1 AFTERNOON SESSION

2 ---oOo---

3 CHAIRMAN BAGGETT: Back on the record.

4 We have San Diego County Water Authority, Mr. Slater.

5 MR. SLATER: Good afternoon Mr. Chairman, Board Member
6 Carlton and members of the Board staff.

7 First of all, San Diego would like to echo Mr. Kirk's
8 comments and thank you for your patience and your support
9 for providing a full and fair hearing of all of the issues
10 before the Board in connection with this transfer. We have,
11 as you know, committed our best thoughts to a brief which we
12 have filed on the important issues of law and fact. We
13 believe the evidence cited in that brief supports our
14 position as well as the findings that you requested.

15 I stand before you mindful of the fact, however, that
16 transcend and compromises and substantial planning efforts
17 have already occurred. And those compromises and planning
18 efforts are indeed embodied in the transfer agreement
19 itself, in this petition and in the QSA that we intend and
20 hope to implement.

21 In acknowledgement that there are or have been
22 substantial compromises that have occurred prior to our
23 arriving here, we would like to at least acknowledge that
24 this process is not relatively new and that from some
25 people's perspective, the 20 years of hell have already

1 passed, that this arrives in front of you in a relatively
2 mature context. There have been years of negotiation and
3 at least three court of appeal decisions, planning and
4 legislative intervention, all in an effort to secure the
5 successful implementation of the California Colorado River
6 Plan. And in some ways the maturity of this process has
7 provided some useful advantages in answers, and provided
8 answers to some traditionally difficult questions for this
9 Board, typically associated with change petitions and water
10 right hearings.

11 And in that regard I would like to call your attention
12 to two specific documents. The first one is the Protest
13 Dismissal Agreement. You haven't seen Met and Coachella
14 before you, and that is because Met and Coachella along with
15 IID have executed the Protest Dismissal Agreement, which
16 successfully resulted in a compromise that allowed them to
17 withdraw their protest on the basis of this change
18 petition.

19 And secondly, there is the Secretary Implementation
20 Agreement, which I would like to go through in some detail.
21 With regard to the Protest Dismissal Agreement, I think it
22 is important for the Board to know that that document and
23 the requested findings that are associated or included
24 within that Protest Dismissal Agreement provided the
25 foundational underpinning for us to move forward without

1 their objections. And as the testimony of Ms. Stapleton
2 demonstrated in the context of the hearing itself, San Diego
3 has and does now provide its utmost support for the specific
4 findings that are requested in the Protest Dismissal
5 Agreement.

6 With regard to the potential for successfully
7 implementing the QSA, we think that there is only one way to
8 do that, and that is in a consensual fashion and via
9 voluntary agreements. And at this late date it makes no
10 sense to turn back on those important compromises. And that
11 is why again we urge the State Board to give meaning to the
12 Protest Dismissal Agreement, and we urge you to adopt the
13 findings associated with that agreement.

14 The second document which I think is of critical
15 importance is the Secretary Implementation Agreement. That
16 is because it serves to resolve some typically, again,
17 sticky questions for the Board. When the Board began
18 looking at the Natomas petition, for example, one of the
19 issues involved in the case was whether or not there was
20 really going to be consumptive savings. There were also
21 issues related to mechanics, how the water might be
22 delivered.

23 And I guess important here today, again we have heard
24 as we heard throughout the hearing that there are
25 significant concerns about the lack of specifics associated

1 with the conservation program. Our simple retort to that is
2 we hold up the Secretary Implementation Agreement. We say
3 by its foundation it is going to require a quantification of
4 IID's water right at 3.1 million acre-feet. And by its
5 terms it obliges the Secretary of Interior to deliver the
6 amount conserved to the transferees, San Diego and
7 Coachella.

8 So if the Secretarial Implementation Agreement, which
9 is I believe IID Exhibit 22E, and I call your attention
10 specifically to Page 3A or -- sorry, Section 3A on Page 3,
11 which indicates that the Secretary shall deliver Colorado
12 River to IID in an amount up to, but not more than, IID's
13 QSA priority three consumptive use quantification cap at
14 3.1 million acre-feet. Then it goes on to say, less the
15 amount made available for transfer.

16 You will recall from the testimony that in some years
17 IID had used more than 3.1 million acre-feet and some years
18 they used less. The Secretarial Implementation Agreement
19 along with the QSA requires IID to quantify at 3.1. Then on
20 Page 4 of the Secretarial Implementation Agreement there is
21 a provision wherein the Secretary makes the water available
22 to San Diego. And as such, there is no question about
23 whether the conservation program can or will succeed. Once
24 IID elects to go forward and elects to pull the trigger and
25 to proceed with the QSA, the Secretary of Interior is there

1 to backstop the commitment by ensuring that the 3.1 less the
2 amount made available for transfer is delivered to IID.

3 I also think that it is important to understand the
4 context in addition to the fact that the process is
5 relatively mature. To understand the context that this is
6 not just a transfer or change petition involving two
7 parties. It is much broader than that. It is presented in
8 a context of being a regional plan for the Colorado River
9 and one that is important for all of California. A context
10 in which there are substantial, real and quantifiable
11 benefits for the Colorado River parties and for California,
12 and those benefits cannot be ignored. They include the
13 continued delivery of surplus water in excess of its basic
14 entitlement to California.

15 How much water is that? As much as 800,000 acre-feet a
16 year. That is a substantial quantity of water.

17 Secondly, it provides an opportunity for a consensual
18 and voluntary physical solution between the parties on the
19 Colorado River to provide for a more efficient use of all
20 water among the various participants. It would also resolve
21 competing claims to the water in a consensual fashion. No
22 more will there be questions about whether IID is wasting
23 water or unreasonable use or the related issues. Those all
24 go away. There will be a comprehensive and coordinated
25 suite of actions in which the parties independent and

1 individual responsibilities are called out. There will be
2 voluntary water transfers of significant magnitude, 200,000
3 acre-feet goes to San Diego and a hundred thousand acre-feet
4 is made available for Coachella.

5 For all of this the transferees agree to underwrite the
6 efforts in order of magnitude of billions of dollars. There
7 are benefits to San Diego in the form of reliable water
8 supply, to be sure. There are potentially reduced calls on
9 the Bay-Delta to import additional water to Southern
10 California.

11 This petition is also extraordinary in the context that
12 for once there are specific state policies that find their
13 home in the QSA. What do I mean by that? Well, there is a
14 state policy about maximizing this state's water resources.
15 Well, nowhere other than -- I couldn't point to anything
16 more real than the use of 800,000 acre-feet of water that
17 would be denied to California if the interim surplus
18 criteria go away.

19 Or with regard to water conservation and Water Code
20 Section 1011, which is designed to encourage water
21 conservation. Here we have a program that is designed to
22 implement that. We have a state policy in favor of
23 voluntary water transfers. Consider Water Code Section 475,
24 consider 1011. The desire of the Legislature was to promote
25 voluntary water transfers, and indeed that is what we have

1 here.

2 We also have an expression where the state voted with
3 its pocketbook and reached into its pocketbook and
4 authorized a continuing appropriation of \$235,000,000 for
5 the lining of the All American Canal and to implement the
6 Colorado River plan for California. And it made that
7 contingent subject to a payback provision that if the
8 IID/San Diego transfer does not go forward and the
9 contingencies are not met, those agencies who are the
10 beneficiary of that money may have to pay it back.

11 At the same time there are these converging benefits
12 associated with the QSA, we also have to recognize that
13 there is a limited window of opportunity. And this
14 opportunity has been set not by the State of California
15 because we are not the last word on the subject. It has
16 been set by the other states and ultimately the Secretary of
17 Interior who has indicated that a failure to sign and
18 implement QSA and the benchmark provisions by 12/31/02 is it
19 for California. It means an interruption of the very
20 favorable surplus criteria. It doesn't mean that there
21 won't be any surplus criteria, and I believe in a question
22 to Mr. Rossmann earlier there was a suggestion that all the
23 criteria aren't interrupted. Well, sure there will be
24 default criteria, but the beneficial criteria for California
25 will be gone and a loss of 800,000 -- up to 800,000

1 go forward.

2 Quickly then moving along so I don't cut in to my
3 colleague's time over here. I do want to address a couple
4 of the key issues that the Hearing Officer and the Board set
5 for the first day or before the first hearing.

6 The first one was whether Water Code Section 1011
7 applied to this transfer and change petition. And the
8 answer is that, based upon the evidence, yes, it does. And
9 1011 should apply in all cases except where permanent
10 fallowing is involved. Permanent fallowing is clearly
11 outside the standards set forth in Water Code Section 1011.
12 But this Board has previously construed 1011, construed the
13 reporting requirements, and it is no quantum leap to have it
14 provide some guidelines on what is meant by temporary
15 fallowing and what is, on the basis of this record,
16 customary and beneficial.

17 There is evidence in the record that it is fallowing or
18 idling of land, idling of land is customary. In fact, there
19 is uncontradicted testimony that it is customary. It is a
20 question of duration. There is some testimony that it is a
21 matter of months and some testimony that it could be
22 longer. There is testimony in the record including the EIR,
23 see Chapter 2, Page 31, in which the EIR identifies that
24 there are benefits, soil benefits, associated with the
25 fallowing program.

1 CHAIRMAN BAGGETT: It seems that we are going to have
2 to make some kind of -- the Board would have to see some
3 kind of final plan to really apply 1011. We have to have a
4 little more specifics, I guess. Is there interim language
5 which you would suggest? Some kind of language to provide
6 that contingent one.

7 MR. SLATER: I think the Board is correct. First of
8 all, this conservation program is being presented in advance
9 as opposed to after the fact. So it is different than, say,
10 Natomas where you had a party coming in and saying we are
11 going to file, we are going to do a conservation program.
12 And we say it complies with 1011, and the Board as a
13 condition can set the parameters for what is in and what is
14 out.

15 I believe there is substantial testimony in the record
16 that suggests that following a piece of ground for a
17 significant period -- some would argue significant is more
18 than five. So would say more than ten. More than a period
19 of years would cause adverse impacts as opposed to
20 beneficial impacts to the soil. So under that circumstance,
21 using data in the record, using facts in the record about at
22 what point it converges or diverts, sorry, from being a
23 beneficial enterprise to being a perfect one. So term of
24 years seems important as it relates to a specific parcel.

25 Moreover, we tease a little bit about using the term

1 "land management" as opposed to fallowing, but I do think
2 there is an important distinction. And one is land
3 management presumes that the process of fallowing is being
4 supervised by somebody to ensure that benefits are actually
5 accruing to the soil and generally speaking as opposed to a
6 renegade party who engages in a fallowing agreement,
7 consequences be damned.

8 Land management in our view means more than
9 unsupervised renegade fallowing. It means a program
10 developed and implemented.

11 MEMBER CARLTON: Follow-up question, I think, Mr.
12 Slater, if I may. I believe you just presented an argument
13 regarding the lack of specifics of the project insofar as
14 guarantees of water being made available. You said that the
15 Secretary's Implementation Agreement would provide those
16 assurances.

17 MR. SLATER: That is correct.

18 MEMBER CARLTON: What do you say about the lack of
19 specifics insofar as they impact this Board's ability to
20 evaluate what the environmental impacts and economic impacts
21 would be when considering those issues as far as approving
22 or denying this?

23 MR. SLATER: It seems to me that one would have to
24 unpack that question into various pieces. There is a piece
25 that relates to how a transfer typically comes in front of

1 you. Typically you don't have a conservation program --
2 sorry, there are two types of transfers, at least two that
3 you would have. You might have one which doesn't involve
4 the implication of 1011 at all. It is by virtue of the fact
5 that the transferor here is seeking protection, specific
6 protection of their water rights, which we think they are
7 entitled to. We want them to have. They are entitled to it
8 under the QSA and under our deal we think.

9 So, because they are asking for approval under 1011, it
10 raises -- now the program becomes more than just the
11 transfer aspect. It also includes a conservation component
12 as well. And the specifics relate to the specific factual
13 circumstance in which we find ourselves. With regard to the
14 socioeconomic impacts, there is no law or present standard
15 which would guide this Board. You would be the first Board,
16 this would be the first instance, in which the Board imposed
17 conditions for the benefit of or to limit a transfer on the
18 basis of socioeconomic impacts, one.

19 And two, consider the fact that the transferor here is
20 not a private party. It is a public agency with a popularly
21 elected board of directors. And who better to design their
22 own program? Recall, they are not required to go forward
23 here unless they want to. People vote with their feet,
24 either they come into the program and sign up or they
25 don't. Who better to decide how the program should be

1 structured than the Imperial Irrigation District? To
2 consider and weigh the relative benefits about how the
3 proceeds are to be distributed. It is, in our mind, a
4 purely political question that is best answered by the
5 Imperial Irrigation District Board of Directors with its
6 constituents.

7 As it relates to the issue of impact on the
8 environment, I would offer a couple of points. This is not
9 a garden variety transfer in the context of injury on
10 instream uses. We have a terminal lake which has been
11 separated by over a hundred years. We would argue and, in
12 fact, have argued that it is an artificial body of water,
13 supported, and nontributary and supported by the
14 importation, supported by the importation of foreign water
15 which then further is dependent on orders by IID's
16 customers.

17 So we have the Colorado River, removed. We have IID
18 which has to order the water in to begin with. Then its
19 customers have to order the water from IID. They have to
20 engage in the discharge practices that they engage in for
21 the water to flow there in the first place.

22 If the interest was a riparian owner associated with
23 the Salton Sea or an appropriator who had come into the
24 Salton Sea after the water had been discharged and wanted to
25 take the water to San Diego, this Board would provide very

1 little in the way of relief or standing associated with this
2 transfer. Why? Because the water is imported and foreign,
3 and that subsequent user takes subject to the rights of the
4 senior.

5 And so in this context we have a beneficial use of the
6 environment, fish and wildlife, who are relying on that
7 return flow. But we should be very -- we would argue that
8 the Board should be very cautious about providing a standing
9 in favor of that beneficial use higher than it would provide
10 a riparian or subsequent appropriator to consumptive use.
11 Not to say you can't, but it rests on more tenuous grounds
12 than a traditional native, say, instream use like you might
13 have found on the American River or Natomas.

14 CHAIRMAN BAGGETT: You would argue socioeconomic
15 impacts should not be considered by this Board at all under
16 any section of Water Code would not be applicable? 109
17 deals with voluntary transfers in the public interest. So
18 that does not apply in this case?

19 MR. SLATER: If the Board -- well, let's start this
20 way:

21 Yes. I think that particularly on these facts where
22 you have a public agency, a transaction between two public
23 agencies, and this is not an irrigation district which is a
24 landowner, has land under --

25 CHAIRMAN BAGGETT: Most transfers are public agencies,

1 between public agencies.

2 MR. SLATER: Who better to be the gatekeeper and to
3 evaluate what is appropriate for that community than the
4 local agency with a popularly elected Board of Directors.
5 And who better --

6 CHAIRMAN BAGGETT: I'm not arguing. I guess the
7 question was: Does the Board have the authority, under 109
8 or under any other section of Water Code?

9 MR. SLATER: If you want to go there now, you are
10 making new law. I am not saying this Board doesn't have the
11 authority to go wherever it wants under Article X, Section
12 2. Because I think there are essentially unbounded
13 restrictions, to the extent that this Board can tie itself
14 to a more efficient use. But we caution you in doing so.

15 CHAIRMAN BAGGETT: That is fair. I want to get to
16 legal.

17 MEMBER CARLTON: Just to clarify the answer to the
18 second part of my question regarding the environment, it is
19 your position that this is a foreign water body and does not
20 require the environmental uses be protected by this Board?

21 MR. SLATER: No. We're not saying that you shouldn't
22 consider and take into account those environmental uses. We
23 believe that fish and wildlife would qualify, for example,
24 under 1243 of the Water Code as a beneficial use. We are
25 not saying that. Nor do we think it is particularly

1 troublesome that the Public Trust Doctrine would apply to
2 these resources; because we agree, they're public trust
3 resources.

4 What you have to consider is the context, the context
5 in which this setting arises. It is not a Mono Lake. It is
6 not that type of situation. We have a relatively tenuous
7 body of supply. The Chairman was asking some questions
8 about some of the unique species that we're looking to
9 protect. And so, yes, you do need to take into account.
10 The question is one of degree. How far should you go to
11 protect these uses, considering all the benefits that I
12 previously articulated and the importance to California?
13 So, yes, you should consider. But we think the balance
14 clearly lies in favor of finding no adverse or unreasonable
15 injury.

16 I will say one last point on this, and that is we're
17 not suggesting that IID doesn't need to go get an HCP and
18 have it certified. There is HCP2 which is designed to
19 comply with other regulatory laws, Endangered Species
20 Act. And when you add that in the mix, the question is do
21 you need to do more to protect the Sea beyond requiring that
22 the HCP be approved?

23 MEMBER CARLTON: Yes. But in IID's closing arguments I
24 sense that HCP2 is not part of their plan or their proposal.

25 MR. SLATER: We respect the right of the Imperial

1 Irrigation District to determine its own destiny. We
2 respect its rights to choose whether it wants to pursue a
3 fallowing program or not. We respect its right to choose
4 whether it is going to proceed with HCP2 or come back in
5 another hearing in another day and argue in favor of another
6 mitigation measure. That is no reason why, that is no
7 reason why this Board cannot -- sorry. That there is no
8 reason present why the Board cannot approve the transfer
9 subject to IID coming back, not for discretionary additional
10 process, but simply identifying the specific measures that
11 it is going to undertake to generate the conserved water and
12 to secure all necessary regulatory permits related to takes
13 or whatever else there may be regarding the Sea.

14 MEMBER CARLTON: Thank you.

15 CHAIRMAN BAGGETT: One final question. You spent pages
16 going through an argument that I guess my summary would --
17 you began by arguing the law of river prohibits use of IID's
18 entitlements other than irrigation and domestic. Then you
19 appear to soften that argument saying that if state law
20 applies to interstate use of Colorado River water, to the
21 extent they are not inconsistent, and then seemed to argue
22 that the Secretary's acknowledged proposed conservation
23 water, which I think you just stated is consistent with
24 federal law, but then concluded that, I think the words
25 were, mixed purpose or combined purposes which could include

1 irrigation is consistent.

2 So I guess I left that argument by being a little bit
3 confused whether permanent fallowing, the fallowing option,
4 is that considered in your opinion incidental use which
5 would be incidental to irrigation which would qualify?

6 MR. SLATER: Let's see if I can go at that by providing
7 a foundation to the answer.

8 In the beginning we argue that and we -- I think
9 everyone agrees with this, that there are no -- sorry, I
10 forgot some of the briefs.

11 There is a strongly held point of view that a new
12 purpose other than irrigation and municipal use cannot be
13 added without triggering a whole series of problems. So
14 then we become -- we come to the question of what is
15 irrigation and what is within this Board's power and
16 prerogative with regard to those areas of state law which
17 are -- have not been preempted, we argue have not been
18 preempted, so long as they are not inconsistent. So to the
19 extent that they are not inconsistent, we think there are
20 three prongs under how this Board could address the issue.

21 The first prong is under a mixed use theory. The water
22 is applied for one purpose and there are other purposes that
23 come along with it. You put water in a reservoir. You do
24 it for domestic use, but, gee, it also provides recreational
25 use too. That is example one. There is federal authority

1 to support that.

2 Then there is a second, which is this Board has already
3 exercised its jurisdiction on Article X, Section 2 over how
4 the water is used. And so to the extent there is going to
5 be a change in the status quo from A to B, you have the
6 authority to regulate that change. And the third which I --
7 we go there with some trepidation, because it involves a
8 question of degree. That is where there is a nominal
9 incidental use within the larger whole. So that if I am
10 providing water for irrigation and there is an incidental
11 use associated with that, we think there is an applied right
12 to do that. But at some point the tail begins wagging the
13 dog.

14 So on the question of degree that becomes important.
15 And now to follow up. The answer to your question: Is
16 fallowing part of it? Well, it depends on how the fallowing
17 is constructed. And I think IID has some rather strong
18 opinions that fallowing is not happening. Whether it is in
19 the context of making water available or in the context of
20 providing water to the Sea. But with all due respect to our
21 partner and knowing their discretion trumps, we would say
22 that at the end of the day if a program was employed in
23 which water was applied, provided some benefits, was
24 captured and found its way to the Sea as a part of a
25 management program, we see no problems under federal law in

1 making that happen.

2 CHAIRMAN BAGGETT: I guess to follow up on that, you
3 would argue, it appears, that for us to use 1736 to deal
4 with what I think you referred to as, quote, alleged injury
5 of fish and wildlife as a condition, but, in fact, you are
6 giving the Salton Sea a right or a implied water right, so I
7 guess you would -- that would leave us dealing with
8 conditioning a permit upon compliance with an HCP.

9 MR. SLATER: Yes, exactly. And I think for good
10 reasons we are not here, we haven't proposed the 1707.
11 Again, I'm sure that IID can address that, but it would be
12 our advice that it was superfluous and not necessary,
13 because you have a right to get at that on your own and it
14 is a beneficial use post discharge. No need to separately
15 file on that.

16 CHAIRMAN BAGGETT: I don't know if this question is
17 better for Mr. Osias, or I know San Diego was pretty heavily
18 involved in the number, the findings which were, quote,
19 required on this Board to make, you would require this
20 Board.

21 Number five was the State Board does not anticipate the
22 need absent any substantial change in IID's irrigation
23 practice or advances in economically feasible technology,
24 goes on and on. Basically asking for assurances that we
25 won't reassess the reasonable beneficial uses in IID in the

1 calendar year 2023.

2 MR. SLATER: Absolutely. We support that.

3 CHAIRMAN BAGGETT: I have some questions regarding that
4 particular section. Should I reserve those for Mr. Osias?

5 MR. SLATER: I would like to try a shot and then Mr.
6 Osias could have it.

7 CHAIRMAN BAGGETT: In IID's brief they go through the
8 whole justification. And the justification appears
9 reasonable. But the language on its face, to me, does not
10 say what the justification is for that language. That
11 they're inconsistent as far as I am concerned. And it
12 begins, simply a reasonable statement of current intent on
13 part of this Board. No way abrogates the State Board's
14 authority to review IID's circumstances. It's on Page 14 of
15 IID's brief is where I am reading.

16 Do you have any suggestions for reconstructing finding
17 five to conform with the reason for finding five, justifying
18 it?

19 MR. SLATER: Well, again Mr. Osias can take a whack at
20 it. I think we would like to offer an additional rationale,
21 which I think is -- sorry.

22 CHAIRMAN BAGGETT. I understand the rationale. I guess
23 in my opinion your rationale does not conform to the
24 language on its face. They are saying slightly different
25 things.

1 MEMBER CARLTON: Let me add to that if I can. The
2 justification is quite broad. It changed and is very
3 logical, whereas the finding is quite narrow.

4 MR. SLATER: Let me try it this way, and, again, Mr.
5 Osias can take a whack at it.

6 We introduced the concept of a physical solution. We
7 do so knowing and understanding that this physical solution
8 is voluntary and consensual. And that the predicates for
9 the Board or court finding that there is a physical solution
10 is that the holder of senior rights are protected and held
11 harmless as a consequence of implementing the program.

12 This program, again, is vast. It's comprehensive and
13 it provides -- it stretches water resources across the
14 Colorado River parties. If that program is going to be
15 truly protective of IID and provide an assurance that the
16 senior right holder, who has participated voluntarily in the
17 physical solution is going to be protected. It needs to
18 have that finding.

19 CHAIRMAN BAGGETT: I think we aren't arguing with --
20 I'll wait for Mr. Osias. He has some -- I have the feeling
21 he understands at least my concern, what is on the right
22 side of the page does not conform to exactly what is on the
23 left. I think my colleague here succinctly said, the left
24 is much more tightly construed than that on the right.

25 MR. SLATER: Since I don't have Mr. Osias' brief handy,

1 maybe I can review it real quickly and --

2 CHAIRMAN BAGGETT: We can wait. We will just wait.

3 MR. SLATER: So, I think I have a few minutes left and
4 to follow up on a couple of points that were raised here
5 today.

6 First of all, we offered some proposed findings, and
7 our proposed findings included subfindings which would
8 allow you to make this finding, and specifically that there
9 were a series or suite of actions that were coming together
10 to support the concept that given the fact that IID was
11 going to bend over backwards to help the implementation of
12 this physical solution, that they should be entitled to
13 those protections. Our findings are offered in the context
14 that they are not intended to be different or inconsistent
15 with the PDA findings; they were intended to augment and
16 provide additional bases for the Board to adopt the
17 necessary findings to approve the transfer and to make the
18 findings as requested in PDA.

19 Three last points. Relate to the subject of fallowing,
20 growth inducement and socioeconomic impacts. There has been
21 some suggestion that the impacts of fallowing were not
22 properly examined in the EIR/EIS. Take a look at
23 Alternative 4. It exhaustively shakes and bakes fallowing
24 every possible way and looks at it in different contexts,
25 permanent, temporary and so on. So, it has been analyzed in

1 the form of the impact. Once again, the bookends are the
2 worst case, is known and understood.

3 The question is whether when IID goes back they will
4 reject following entirely or adopt some mix in their
5 discretion and designing their conservation program.

6 With regard to growth inducement, a couple of key
7 details. One, it is the same source of supply, Colorado
8 River water being delivered to San Diego now. We are going
9 to get Colorado River water in the future. It is the same
10 quantity of imported water coming to San Diego County. We
11 are getting 600- now. We're going to get 600- after the
12 deal. It is the same methods of conveyance through the
13 Colorado River Aqueduct. And, true, the molecules of water
14 may be commingled. Some of the molecules may end up serving
15 new customers, but the basic point is the new water supply
16 affectively is going to come from local projects.

17 MEMBER CARLTON: On that please. It was suggested
18 that with the transfer in place San Diego would have greater
19 certainty of that supply, almost assured as opposed to
20 problematic. Do you have a comment on that?

21 MR. SLATER: In my personal point of view I think we
22 love the richness and priority of IID's water rights. It's
23 one of the reasons we did the deal. In my perspective it
24 was and is the right thing to do.

25 On the other hand, the Metropolitan Water District is

1 quite confident in its projections and its ability to meet
2 its demands, without regard to whether the water comes from
3 the Colorado River Aqueduct. So when you begin arguing
4 about degree of reliability, it becomes pretty subjective.
5 Metropolitan Water District believes its supply is
6 reliable. And San Diego said, "Great. We'll take that
7 recommendation and we are going to try to do something about
8 that and make it a little more reliable."

9 We don't think there is any credible evidence to say
10 that if something is 97 percent reliable and you make it a
11 hundred percent that that is growth inducing.

12 Then with regard to the question of this Board's prior
13 treatment of the subject of growth inducement, there are a
14 series of decisions in which this Board has routinely said
15 that where the issue of growth inducement is part of the
16 project and there is a local agency that is responsible for
17 administering and carrying out the land use planning effort
18 that this agency or this Board will defer to that local
19 agency process. We are simply asking that you do so in this
20 case.

21 Finally, with regard to the question of socioeconomic
22 impacts, which I think we have hit in great detail, again, I
23 want to say that in our view the San Diego County Water
24 Authority executed an agreement with IID which was by design
25 intended not to create socioeconomic impacts. It was

1 designed to pursue an on-farm conservation program with
2 measures other than land fallowing. On the other hand or --
3 that notwithstanding, there is a possibility that IID could
4 in its discretion decide to implement a program that might
5 have some socioeconomic impacts, and we would support them
6 in their ability to develop a local program to implement a
7 mix of conservation measures that meets the needs of its
8 constituents and allows this project to move forward. It
9 alone is in the best situation to take input from the County
10 of Imperial, the farmers who here today and anyone else
11 within its constituent base about how the proceeds ought to
12 be distributed. It is not a question of whether adequate
13 revenues are being provided. It is a question of how they
14 would be divided.

15 With that, I will answer any other questions you have
16 or turn it over to my colleague, Mr. Osias.

17 MEMBER CARLTON: One final question on your final
18 comment. It was suggested earlier by Mr. Rossmann, I
19 believe, that the county has a broader interest than the
20 District would in the socioeconomic impacts and would in
21 some form like to be part of the process or at the table in
22 determining, have a role in the distribution of those for
23 the good of the whole, if you will.

24 Do you have any comment on that?

25 MR. SLATER: I am going to leave that to the good

1 graces of politicians from Imperial Irrigation District.
2 They are under case law and statute they are the trustee in
3 a sense for the water rights within their boundaries and
4 the rights of their customers. They are duty bound to take
5 that into account. And to the extent that the County of
6 Imperial has important information to offer on how the
7 benefits and revenues of the transfer can be divided, it
8 seems to me it makes good sense for them to coordinate their
9 efforts.

10 CHAIRMAN BAGGETT: Thank you.

11 MEMBER CARLTON: Thank you.

12 Mr. Osias, you asked to be last. I think it is only
13 proper. I don't know whether we should start asking
14 questions or allow to address what you anticipate. I think
15 you anticipated a few.

16 MR. OSIAS: I was going to start my comments with -- I
17 have some prepared remarks and you have some anticipated
18 remarks, I think, I might inquire into. I also tried to
19 track what you were asking everyone else. I thought I would
20 start down my prepared remarks, although prepared may be an
21 overstatement, and feel free to divert me --

22 CHAIRMAN BAGGETT: We will.

23 MR. OSIAS: -- as your curiosity requires.

24 Let me start by reminding the Board -- and by the way,
25 to save time I echo everyone's appreciation. I think these

1 hearings have run extremely well. I think that is a credit
2 to everyone who's participated, both on your side and I
3 think of the group.

4 IID, like just about everybody in this case, is
5 somewhat of a unique creature in terms of being a water
6 right holder that comes before the Board. Its water right
7 was established commencing in 1885. And by 1924, well
8 before the Boulder Canyon Project Act, had 400,000 under
9 irrigation. The water rights evidence we put in has been
10 uncontroverted. In 1931 the seven-party agreement was
11 executed. Three of those parties were already diverting
12 water. Coachella, Metropolitan and County and City of San
13 Diego were not. Not surprising they got the lower
14 priorities.

15 IID's historical use, perhaps one of the most often
16 used exhibits, Exhibit 11, evidences dramatic fluctuations
17 in volume. The Chair in one of his questions mentioned that
18 before. We are talking hundreds of thousands of acre-feet
19 of difference from year to year. That volume depends upon
20 weather, water salinity in the Colorado which changes,
21 cropping patterns, crop markets and pests. We had an
22 example even from recent times, 1992, about 2.7 million
23 acre-feet diverted into Imperial. 1998, 3.2. That is a
24 500,000 acre-feet swing in a five-year or six-year period.
25 Since 1998 the Sea has dropped a foot, evidencing reduced

1 use or increased reuse.

2 With those facts in mind, this Board should reject what
3 was apparently a disingenuous testimony by Dr. Krantz that
4 the Salton Sea habitat is very sensitive to even slight
5 changes in inflows. And we have that kind of problem, the
6 facts of history not matching up to the advocacy for the
7 Sea. We cannot talk about average use in a meaningful way
8 when we have these natural substantial fluctuations without
9 masking many reality conditions.

10 Imperial Valley has developed, based on this very high
11 priority and large water right, an active and thriving
12 agricultural products market, produces about a billion
13 dollar in goods. The crops, the evidence was, produced in
14 Imperial Valley change substantially over time. This
15 background all becomes important when we look towards a
16 long-term deal.

17 For example, not only do we have the crop rotation
18 which we heard testimony about which is necessary for land
19 productivity purposes; three or four years in alfalfa, then
20 you switch to something else before you can get back into
21 alfalfa. But we had evidence in Phase I that, for example,
22 you go back 20 years and you can find substantial acreage in
23 cotton, English peas and flax. Virtually none today.
24 Fifteen years ago we had no significant Sudan grass. Today
25 significant substantial acreage and a very important crop.

1 Twenty years from now we don't know.

2 Any project, any program that requires conservation has
3 to accommodate this inherent flexibility in what to grow.
4 IID's irrigation efficiency, 83 percent. That was
5 contrasted by the experts who were here with the DWR goal
6 for 2020 of 80 percent. And a more realistic expectation
7 on-farm efficiency would be 73. Coachella admitted in
8 cross-examination they were at 75 percent. There was a
9 chart comparing IID to other Southwest users, very high
10 current use in terms of efficiency. Its delivery efficiency
11 despite its size, and frankly despite the age of its
12 diversion system, 89 percent.

13 So why is the IID here? Well, as briefed extensively,
14 IID first showed up here involuntarily, and this Board has
15 issued decisions. And as part of Decision 1600 and as part
16 of Decision 8820, this Board retained jurisdiction, requires
17 annual reporting and actually said it wanted to have
18 oversight with respect to the potential for future
19 conservation. Now, those cases, those decisions, and those
20 words have not gone unnoticed by those in the water
21 community who don't have enough water.

22 So despite IID's full compliance, its annual reports
23 and frankly no affirmative action by the State Board since
24 the completion of the 1988 transfer, which was fully
25 completed by 1998, others have continued to say we should

1 get some of IID's supply. Well, Imperial Irrigation
2 District would like to put that behind them. They would
3 like to relieve this Board of its duty to continue to
4 supervise, and would like to stop hearing those sort of
5 demands.

6 So without any nudging from the Board, the IID said
7 let's see if we can find a way to fund efficiency
8 improvements and become so darn efficient that no one will
9 need to bother us anymore on that front. And they set out
10 to do that, and it is not a coincidence that the volumes
11 involved in this petition track approximately that which the
12 Board identified back in the late '80s. So they proactively
13 came here for two purposes. One, to finish 1600 and 8820
14 and 8412 and the annual reporting. And, two, and to
15 accomplish that, to obtain funding to become more
16 efficient.

17 A question which we will have to come back to and which
18 I am sure you are going to talk to me about is fairly
19 fundamental. What does this Board really prefer now that it
20 is 2002? A more efficient Imperial Irrigation District with
21 reduced flows to the Salton Sea or the status quo? It is
22 very difficult to have both, improved efficiency and the
23 status quo for the Salton Sea. In fact, it's darn near
24 impossible. There has been no suggestion that you can do
25 both.

1 What is the basis for the petition? Well, we have an
2 agreement with San Diego to transfer 130- to 200,000
3 acre-feet a year. We have a very pretty -- I brought but in
4 the interest of time I won't put it up -- picture that shows
5 how we get there. It steps down. There is a range, 130- to
6 200-. Because there is an on-farm component of 130- and
7 there was a reservation for the District to do 70- of system
8 if it chose to. It is pretty clear that in terms of needs
9 200- would be the preference. But again, design
10 contingency, left that flexible. There is also a proposed
11 transfer to Coachella of a hundred. That steps down in very
12 small steps. Steps up in their perspective in 5,000
13 increments. And if Coachella doesn't want that water, it
14 can go to Met.

15 Now, that is the project. We have to be careful
16 because we are sort of -- we are engaged in this discussion
17 in multiple settings. The State Board as a
18 transferor-transferee reviewer should look at this from a
19 project perspective as conservation activity and transfer
20 activity and then get to its findings, statutory findings,
21 that are required, answer those questions. Of course, there
22 is CEQA a process that is parallel. This Board can't act
23 until certain CEQA steps are done. But CEQA deals with
24 questions like is there an impact that is mitigable. Is it
25 significant? Is it not significant and mitigated? Are

1 there overriding considerations? Those are CEQA questions.
2 This Board's questions are different.

3 If the transfer takes place and conservation is created
4 by efficiency, are the impacts to fish, wildlife and other
5 instream -- we'll talk about that in one minute -- are they
6 unreasonable. Those are different questions. There
7 certainly is a nexus in the facts, but they are different
8 questions.

9 Imperial proposed because of the change in cropping,
10 because of the change in market conditions, because of the
11 change in cost based on soil and slope and all those other
12 factors, to define its conservation project as actually
13 saving water in the volume of 230- to 300- and not
14 fallowing. That is the definition. That is not too vague.

15 What do you have to assess now to answer the
16 questions? Well, what's the impacts at the high end?
17 What's the impacts at the low end? What are alternatives?
18 We have those in the EIR because they are required to be,
19 not because we wanted the Board to pick one. We had to look
20 at alternatives for environmental impacts. They were
21 smaller transfers, and they were by different devices.

22 Since the project itself covers everything but
23 fallowing an alternative had to be fallowing because that
24 was clearly an alternative. So we studied, as Mr. Slater
25 said, the impact of fallowing in different volumes and

1 different ways. So the impacts are there and it is, though
2 I know more about the Evidence Code than the Highway Code.
3 It sounds like the highway cases to me. The impacts are
4 going to be to the drains. They are going to be to the Sea.
5 They are going to be on other habitats, maybe the air. And
6 it results from reduced in flow. Different volumes produce
7 different impacts. But except for fallowing which has some
8 field impacts in addition, because it is bare ground, the
9 cause, whether it is dead level, tail water pump backs, 20
10 more irrigators, the cause of creating conserved water
11 doesn't determine impacts. To the Sea reduced flow is
12 reduced flow. All those were assessed.

13 The contract preserved to IID how to conserve. Other
14 than prohibitions which I described, that is what we seek to
15 have approved. We don't seek to have an alternative
16 approved. We seek to have what we came forward with to have
17 approved.

18 Why? Well, improved efficiency paid for by others
19 creates a new water supply for the others without reducing
20 agriculture activity in a one-industry town. It is a
21 stimulus to the economy, uncontroverted evidence about
22 that. It satisfies any injuring doubts that IID has
23 maximized its efficiency that I described in the beginning
24 of my comments. It produces a reduction in Sea elevation to
25 solve the flooding which got IID into your domain in the

1 first place. Remember IID was here involuntarily because
2 too much water was going to the Sea, according to your
3 finding. It creates an opportunity to settle with Coachella
4 and Metropolitan disputes which have been festering.

5 So what must you decide? In reality, although you can
6 consider many things, you must decide at least two. No
7 injury to legal user. The junior right holders have
8 consented. The Colorado River Indian Tribe, the only other
9 party to raise that issue, interrogatories went out, they
10 responded. I will rest on that. Their water right's not
11 impacted. Their wish for flow by is what is impacted.

12 So we are really down to the question would this
13 proposed conservation and transfer produce unreasonable
14 impacts on fish, wildlife and other instream uses. To the
15 extent that is taken literally, which statutes often are,
16 the Supreme Court is more and more fond of that, U.S.
17 Supreme Court, anyway. The instream uses are that Colorado
18 River and its tributaries. There is nothing in Imperial
19 Valley that is that. And potentially the natural flow in
20 the New and Alamo River.

21 As to the Colorado River, there is no significant
22 evidence -- there is no evidence of any significant impact
23 whatsoever. As to the New and Alamo Rivers, they actually
24 have very little natural flow. I think the -- I will get
25 them mixed up. One of them comes across the border with

1 almost no flow, and by the time it hits the Sea, it is 90-X
2 percent drained of water, which would be affected by
3 reducing drain flows. So that is an impact that was
4 studied.

5 And the other has cross border flow primarily from the
6 sewage that comes across from Mexicali, I guess, the New
7 River and then it is benefited by drain flows in terms of
8 dilution. The impacts on the instream flows are not
9 unreasonable, and except for water quality are not even
10 significant in CEQA, so to speak.

11 As to the water quality throughout the rivers and
12 drains, the replacement habitat is proposed, new trees, new
13 bushes, new habitat, because there is no way to solve for
14 selenium in the drains. There is no way to solve for
15 selenium in the rivers.

16 The Salton Sea is really the focus, and there parties
17 have focused on two things, the Salton Sea as a fish and
18 avian habitat and potential air impacts. The question of
19 unreasonable impacts has to look at countervailing benefits
20 and alternatives. And Mr. Slater spent quite a deal of time
21 on the benefits, and benefits to IID are what I just spoke
22 of. I won't repeat the benefits to everyone else other than
23 to confirm that those who suggest that the interim surplus
24 is either of a nominal value to Metropolitan or could be
25 lost for several years with just a shrug are not paying

1 attention. When someone from DWR comes and says not only is
2 the loss of water a problem, but it could have catastrophic,
3 I think those were his words from the transcript which we
4 cited, catastrophic impacts on the CALFED process. Then
5 this Board needs to factor that in to a reasonableness
6 determination. And an isolated review of the Salton Sea is,
7 therefore, not warranted.

8 So, what do we know about the Salton Sea? Well, let me
9 start with it has no rights to water. You've heard some of
10 that already so I'll go very briefly through that. No one
11 is buying water to put in the Sea. No one has offered to
12 buy water to put in the Sea and no one has the right to buy
13 water to put in the Sea. If you look at the Salton Sea
14 Restoration Act, Section 101(b)(2)(C), Congress prohibited
15 any new or additional water from the Colorado River to be
16 put in the Sea. It is not how it intended the Sea to be
17 fixed.

18 We have interestingly older than the Salton Sea
19 Restoration Act California's view of the importance of drain
20 water to the Salton Sea. And it was in Section 1013 of the
21 Water Code. IID shall, I'm paraphrasing, not be liable for
22 reduced inflows to the Salton Sea, a legislative grant of
23 immunity. If you look at the legislative history for that,
24 it was to encourage cutting off the flows. And IID had been
25 tagged for flooding damages, didn't want to get tagged again

1 for isolating marinas, extra hikes to the Sea and the
2 fisherman who would lose their fishery. Legislatures said,
3 "Fine, we adopt 1013. Please go do some transfers."

4 The second most important point -- I have hidden the
5 clock; that is a bad idea -- is that the conservation and
6 transfer does not create the Salton Sea's problem. It does
7 influence it. It does exacerbate. But it does not create
8 it. It is very unlike, say, Mono Lake where the diversion
9 created the problem. The Sea is suffering from rising
10 salinity, increasing toxicity, it's a third more salty than
11 the ocean. In 1996 10 percent of the western white pelicans
12 were killed there, and it is not stable. And it is only
13 going to get worse unless someone can figure out what to
14 do. And we should all be honest. No one is going to figure
15 out what to do and no one is going to pay for it unless
16 Congress does. And Congress was pretty clear of what they
17 had in mind with respect to what is going on here.

18 Let me quote something. Efforts are currently under
19 way which would transfer between 130,000 and 300,000
20 acre-feet of water from the Imperial Irrigation District to
21 the San Diego County Water Authority. Additionally, efforts
22 to treat municipal and industrial wastewater in Mexicali
23 result in some water being redirected south of the
24 international border. This will reduce the amount of water
25 flowing north into the New River, which would further reduce

1 inflow into the Salton Sea. Therefore, design calculations
2 must be based on the assumption that flows into the Salton
3 Sea could eventually be reduced to 800,000 acre-feet per
4 year.

5 These provisions are included to clearly indicate the
6 committee's support and approbation for anticipated future
7 water transfers out of the Salton Sea basin and to avoid the
8 adoption of an alternative that frustrates such water
9 management choices.

10 The first part sounds like it comes from our EIR, but
11 it is from the House Committee report for the Salton Sea
12 Restoration Act, which was reflected in the act when in
13 Section 101(b) the Secretary's compelled to do studies of
14 options and from Section (b) (3) the Secretary is told,
15 quote, in evaluating opposition the Secretary shall apply
16 assumptions regarding water inflows into the Salton Sea
17 Basin that encourage water conservation, account for
18 transfer of water out of the basin. It is not even being
19 neutral, not even say, "Make sure you look at it and then do
20 what you want." Encourage transfers out of the basin. So
21 if Congress, which is the only realistic party to save the
22 Sea says, "Let's have these transfers happen," then I don't
23 think it is for this Board to say that restoration which is
24 impractical without Congressional funding should hold up
25 transfers which Congress contemplated happening first.

1 As to the CEQA issues, I am prepared to respond to all
2 your questions about those. Public trust doesn't apply.
3 And frankly ignoring the artificial nature of the water,
4 there is no public trust case that would compel a water user
5 to import water and dump it on somebody else's land. The
6 courts have ruled that's what's happened. It is not even
7 going on the state's land. The state may have a couple
8 acres there, but the rest of the Sea is owned by others.
9 IID forced to buy it. So public trust does not compel
10 that.

11 I'm out of time, but I haven't answered your questions.
12 If you'll ask them --

13 CHAIRMAN BAGGETT: We have questions.

14 MR. OSIAS: That's fine.

15 CHAIRMAN BAGGETT: We both have a couple here.

16 I want to go back to the findings, five and six both.
17 You've got two findings there which you're requesting this
18 Board make.

19 MR. OSIAS: Should we start with your questions on five?

20 CHAIRMAN BAGGETT: Start with five. I was going to
21 articulate my concern. Maybe I should see if you
22 understand.

23 MR. OSIAS: I see -- I heard your questions and I glean
24 from them that the explanation was acceptable but you didn't
25 think it -- you didn't think the finding itself was

1 consistent.

2 CHAIRMAN BAGGETT: Wasn't consistent. You have
3 suggested --

4 MR. OSIAS: Let me first just wordsmith for one minute
5 to see if through discussion they appear more consistent,
6 and then I'm open to discuss changes.

7 This is, I believe, although we have a four-party
8 agreement and all would have to sign off. This primarily is
9 for IID's protection.

10 CHAIRMAN BAGGETT: I assume it was. I know Met likes
11 to look at it for IID's interest.

12 MR. OSIAS: The first sentence of the explanation talks
13 about this being a statement of current intent. And at
14 least to use the phrase, does not anticipate, is intended to
15 be an expression of intent rather than cannot or won't, does
16 not anticipate. Anticipation change with changed
17 circumstances. So those are different words. I think they
18 are both expressions of intent rather than one intended to
19 bind.

20 The other is the absent any substantial material change
21 language, and there the finding uses two specifics and the
22 explanation talks about substantial changes, but didn't
23 limit it to those two specifics. And I agree that those are
24 different. Now, to sneak in an answer to another question.
25 Since we are not contemplating following as part of this

1 deal, what would be the changed circumstance? At least when
2 this was written it was thought by those who were concerned
3 about our efficiency that if all of a sudden \$5.00
4 mitigation, or maybe that is too extreme. Ten cent
5 mitigation became available or a seed was developed that
6 needed to be watered once a year, that could be the kind of
7 thing that notwithstanding we are in the middle of a ramp
8 up, might adjust. So that is where those came from.

9 Obviously, if you're thinking of circumstances
10 unrelated to efficiency, like environmental, the deal is
11 structured and it is not this finding that should give you
12 pause. The deal is structured to try to avoid environmental
13 cancellation by either getting the appropriate findings from
14 here and the endangered species resource agencies up front
15 or not starting. That is because if significant capital
16 expenditures are made and then the deal goes sideways real
17 quickly, there are stranded costs.

18 So to come back to your concern. You're concerned that
19 efficiency based focus for changed circumstances is too
20 narrow or is it that these two examples that are in the
21 finding on that subject are too narrow?

22 CHAIRMAN BAGGETT: Probably both to some extent. And
23 third it is a challenge. One, this is one Board. By the
24 year 2023 I think it is safe to say it will be a very
25 different Board, if there even is a Board. I think that is

1 another challenge. It is like IID cannot bind future
2 board's actions, not knowing who they're going to be.

3 MR. OSIAS: Let me start again. This is not intended
4 to bind even. The goal, of course, is to have you remember,
5 institutionally remember, but not to bind. That is why it
6 is expressed as in anticipation. The second is remember
7 that the project -- in ten years the project is less than
8 half-way ramped up.

9 So if somebody came forward and said, "Geez, IID,
10 you're wasting water to the tune of a hundred thousand," and
11 we were in year ten, they'd say, "Well, we have 150,000 to
12 go, and here's the schedule. What are you --"

13 CHAIRMAN BAGGETT: Your explanation has been helpful.

14 MR. OSIAS: I am not sure what the process is. We can
15 work on this, but our goal is not to bind and to --

16 CHAIRMAN BAGGETT: Traditionally, the process I think
17 you are well aware from this Board, is drafts and finals,
18 and there will be opportunities.

19 MR. OSIAS: Did you say four also or did you say six?

20 CHAIRMAN BAGGETT: Six. I think there is probably ten
21 and 11. Of course, I gather your position is the HCP2 is
22 off the table? Or if there is no proposal to have any
23 phantom farming, rotational, temporal fallowing, or like Mr.
24 Du Bois answered earlier that rotation cover crops were
25 used, but some would argue is a fallowing, quote-unquote,

1 method.

2 How would you deal with 1011? I guess you wouldn't
3 have to in those situations.

4 MR. OSIAS: I think that is right. I think I should
5 probably answer the question of where is the -- what does it
6 mean to say we are not going to fallow, and then how do we
7 apply 1011?

8 CHAIRMAN BAGGETT: Right.

9 MR. OSIAS: Simply put, we are not going to fallow.
10 IID came to this Board with a petition that didn't request
11 approval of fallowing. The evidence that was put on, as we
12 said in our brief, was because in the EIR it was required.
13 Hard to think of other alternatives since the permitted
14 conservation method is everything, other than fallowing, so
15 we had to put that.

16 If the Board is interested in this question and answer
17 session, I will go through why we won't do it. But HCP is
18 not synonymous with fallowing. So that is part of my
19 response. First of all, the HCP, we should recognize, deals
20 with far more than that Salton Sea. There are six resource
21 areas.

22 Second the HCP is, in fact, only a tool for gaining
23 approval from the resource agencies with respect to
24 Endangered Species Act issues. It is not the only tool
25 available. Happens to be the one that is in the current

1 EIR. The project could go forward without an HCP. It
2 could go forward with a changed HCP. And if you said it was
3 a changed HCP would that require a change to the EIR? The
4 answer is yes. And the substance of the HCP, especially
5 with respect to species impacts that are protected by the
6 acts and especially with respect to the Salton Sea, are the
7 appropriate, at least more appropriate if I might say,
8 domain of the resource agencies. I think the questions
9 before which said if we condition approval, and if we
10 condition our finding of no unreasonable impact on the
11 transfer and conservation gaining compliance through a legal
12 device from the resource agencies, is that sufficient? And
13 I would answer, yes, that is sufficient. And therefore, if
14 there is no fallowing, there is no 1011 issue with respect
15 to fallowing.

16 I would challenge the summaries that have been
17 presented here today on the evidence regarding the
18 occurrence of fallowing in Imperial. There is no evidence
19 that fallowing regularly occurs for two years in Imperial
20 Valley. There is not even a debatable question in the
21 evidentiary record on that subject. On the other hand, if
22 we were preWorld War II so that there was cover crops being
23 used in the crop rotation, doing that wouldn't create any
24 new water. Only dictate that someone do that instead of the
25 farming that they were otherwise going to do would you get

1 any extra water to transfer. Same with fallowing. If the
2 land sits idle or you do an extra leaching on it for a
3 couple months between crops, that is already in our water
4 use. You have to tell someone to do that then when they
5 otherwise weren't going to in order to create water to
6 transfer. That is no longer customary. It is by
7 self-definition defeated. So I think there is a real
8 problem that, to be honest, as a water lawyer I can't
9 understand how you could comply with the customary and
10 beneficial fallowing provision of 1011 and create anything
11 by paper water.

12 If you are already doing it, it is not. If you are not
13 already doing it, it is not customary. Those seem to be
14 mutually exclusive, and it the most incomprehensible
15 amendment. It came in, I think, in '99, and there haven't
16 been any cases under it yet. Someday someone will say the
17 Legislature didn't quite get this right, in any event.

18 We think 1011, the purpose of this finding, maybe I
19 should just go to that, was to make sure that this Board
20 acknowledged for IID's benefit these state law provisions to
21 protect 1013, as I mentioned before is a no liability. 1011
22 gives us the protections of rights. It deems the
23 conservation, reasonable beneficial use, et cetera.

24 That was that question.

25 CHAIRMAN BAGGETT: Got a couple more.

1 I think there was -- out of the enforcement actions
2 taken by the Bureau, I think the conventional wisdom is that
3 Coachella would be the agency absorbing the impact of 59,000
4 acre-feet that was discussed earlier as I recall. Due to
5 the fact that they have agreements subordinated some of
6 their rights to IID. However, the 50,000 acre-feet can be
7 paid to Coachella by Met by side agreement between them.
8 Given a significant change in the baseline that is outlined
9 in response in the Final EIR, would it be prudent for IID to
10 consider a net loss to Salton Sea of only 9,000 acre-feet
11 which is the difference between these two? What affect on
12 the baseline would that have?

13 MR. OSIAS: I think I have a three-part answer. First,
14 as Dr. Eckhardt said on redirect, whether the water is cut
15 off from Coachella or IID, the Sea doesn't care. The impact
16 of 59- is 59-. I agree that the junior right holder would
17 take a cut.

18 For modeling Sea impacts it is not particularly
19 important, except for the second part of your question,
20 which is the approval agreement. Now, in his redirect
21 there were two important facts. We have the approval
22 agreement as exhibits. My colleague will look it up. But
23 if there was a 59,000 acre-foot overage in priority three,
24 50,000 would not be available for Met. It takes a hundred
25 thousand overage to get to 50-. It is not a linear curve.

1 In the approval agreement, which is Exhibit 16, there is a
2 formula and in the back three examples of how to apply it,
3 so you can get a sense for what that would be. That is part
4 one.

5 Part two is that the 59- is an average. And as we went
6 through that hypothetical example with Dr. Eckhardt on
7 redirect and as we saw from Exhibit 11, with respect to the
8 fluctuations in on IID, even if when it is over, when
9 priority three is over, regardless of who causes it, it
10 could be priority one, if it is over by more than a hundred
11 50- is available. It doesn't mean it's the 59- for versus
12 the 50- that you do for the math. When it is over by 200-,
13 you get 50-. There is a cutback of 150- in that year, not
14 nine. So you can't use the average overage, which is the
15 59- number and the amount of water available.

16 In the example he did, I do have my notes here, it was,
17 you know, in his example I think instead of 50- being
18 available it ended up being, like, 30- or something. I
19 think it was like 30-. So it changed the impacts from 59-
20 to 39-.

21 Does that change the baseline? The answer is yes. And
22 there was a sensitivity test done, and it looked at instead
23 of 59- what if it was a third of 59-, which I think was 19-,
24 roughly. I think the number was actually 56.9 from the Sea
25 perspective. It looked at what if there was a 19- reduction

1 instead of 59-. Although it found that that pushed the
2 median. Didn't really push it outside the 90 percent
3 confident interval. And there were other assumptions that
4 pushed back in the other direction to make the package of
5 assumptions for the baseline reasonable. And that is what
6 Dr. Eckhardt's bottom line testimony was.

7 The baseline reflects many factors. And, of course, if
8 we eliminate all the ones that hurt the Sea, the life of the
9 Sea would be longer. If we eliminated only the ones that
10 helped the Sea, it would be a lot shorter. And we included
11 both with the same judgment. For example, salinity,
12 projected salinity impacts, from the rising salinity in the
13 Colorado River extended Sea life under the sensitivity
14 analysis by six years, if I recall. We have that in the
15 Final EIR comments, the sensitive analysis.

16 So the answer to your question is if it is Coachella
17 and we use the approval agreement, the math is not 59- minus
18 50- to change it to nine. But what it really is is much
19 closer to that 19-. If you took that factor in isolation,
20 you would move the median out.

21 CHAIRMAN BAGGETT: Okay.

22 Gary, do you have any?

23 MEMBER CARLTON: No.

24 CHAIRMAN BAGGETT: With that, I have no additional
25 questions.

1 MR. OSIAS: I have one request to introduce a document,
2 and I will base it as follows. Since we took literally the
3 instructions not to add new things to our brief, we didn't
4 cite it. But what it is is the testimony under oath of
5 Bennett Raley at the same Congressional hearing that Mr.
6 Hannigan's testimony was. Since it is much more recent than
7 his speech, which wasn't under oath, given in Nevada which
8 is offered in -- I would like to offer his June 14th, if I
9 recall, of this year of his Congressional testimony.

10 CHAIRMAN BAGGETT: Any objection?

11 MR. SLATER: No.

12 MR. ROSSMANN: I think there is a misunderstanding. We
13 were referring to when we were citing Mr. Raley's views in
14 our argument was the actual Federal Register statement of
15 Mr. Raley that was actually attached to Imperial Irrigation
16 District briefs. So that is perhaps issue to take up --

17 CHAIRMAN BAGGETT: So it is already in the record?

18 MR. OSIAS: That is the Federal Register notice. That
19 is not his testimony. I think maybe it is because it is
20 Defenders who offered this in rather than Mr. Rossmann.

21 MR. ROSSMANN: That is what I'm saying. Your Honor was
22 looking at me and I --

23 MR. OSIAS: I just look at you and I see everybody on
24 this page. I'm sorry.

25 We have Mr. Raley's written remarks from the Colorado

1 River Water Users Association, which was a speech that he
2 gave, and that's been admitted into evidence. I would like
3 to have some more correct testimony under oath on the same
4 subject offered in. And I would have argued from it when we
5 answered your questions in our brief if I thought that had
6 been permitted, but I think in order to put what's been
7 admitted already into context, his under oath statement
8 should certainly be.

9 MR. SLATER: No objection.

10 CHAIRMAN BAGGETT: Mr. Rossmann.

11 MR. ROSSMANN: There would be a technical objection,
12 but in the spirit of giving the Board everything, then I
13 would withdraw it.

14 MR. OSIAS: We will certainly provide a copy to
15 everybody and that will be IID 94.

16 CHAIRMAN BAGGETT: Thank you.

17 With that, I think we have all the evidentiary things.

18 That ends the hearing, at least the open oral portion.

19 I guess maybe we could go off the record for a minute.

20 (Discussion held off the record.)

21 CHAIRMAN BAGGETT: Back on the record.

22 On the record after discussion we have decided that
23 there will be no supplement briefings and this hearing will
24 be closed, and Board will take under submission the evidence
25 and testimony offered before it.

1 I think we have ruled on all evidentiary issues. There
2 are not outstanding evidentiary issues. So you will be
3 hearing from us.

4 With that, I guess I would like to echo accolades to
5 everyone here has already stated. It's been an incredible
6 amount of work. Our staff has been great. Gary just coming
7 on Board at the end of this, he's doing an amazing job of
8 catching up on lots of history and time, and I am glad he
9 had the opportunity to attend these last two days, get an
10 opportunity, at least a flavor for what we've been
11 through. And looking in retrospect, it was something people
12 said we couldn't get through. I think to the credit of
13 everyone here we did.

14 Couple people here should probably go to law school
15 when we are done with this hearing, almost looking for more
16 members of the Water Bar. For those of you I know it is --
17 some of your earlier experiences before this Board, I know
18 it's been rewarding and worthwhile. I think there was some
19 good people to learn from here and some excellent writing in
20 some of these briefs. I certainly did, even though it kept
21 me up late, I did really enjoy reading some of the arguments
22 made. They are articulated quite well.

23 With that, thank you again and this hearing is closed.

24 (Hearing concluded at 2:30 p.m.)

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REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

I, ESTHER F. SCHWARTZ, certify that I was the official Court Reporter for the proceedings named herein, and that as such reporter, I reported in verbatim shorthand writing those proceedings;

That I thereafter caused my shorthand writing to be reduced to typewriting, and the pages numbered 3271 through 3417 herein constitute a complete, true and correct record of the proceedings.

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, on this 26th day of July 2002.

ESTHER F. SCHWARTZ
CSR NO. 1564

